TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 615.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

NATIONAL RICE MILLING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED JUNE 30, 1913.

(22,766)

(25,766)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 5, 1913.

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a STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Civil District Court for the Parish of Orleans.

No. 89927.

Civil District Court, Division "E."

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS AND NORTHEASTERN R. R. Co. and SOUTHERN RAILWAY.

Detailed List of All Docket Entries, in Chronological Order, from Docket Number Four, in the Above-numbered and Entitled Cause, from the 28th Day of May, 1909 (*the Date of Filing the Original Petition*), *to the 28th Day of November,* 1910 (*the Date of Filing the Appeal Bond*), *Both Inclusive.*

1909.

May 28. Petition and two bills of lading (in vault).
28. Two copies of petition and two citations.
June 8. Answer of N. O. & N. E. R. R. Co.
8. Answer of Southern Railway Co.
9. Return on two citations.
Nov. 30. Issuing two commissions.
Dec. 15. Received depositions.

1910.

Jan. 20. Depositions delivered unopened to Hall & Monroe.
20. Preference.
Feb'y 3. Preference.
11. Received depositions.
15. Depositions delivered to H. H. Hall.
17. Prefeernce.
March 3. Preference for argument.
7. Motion for record (A. A. Moreno).
17. Preference.
30. Note of evidence.
31. Preference.
April 28. *Return* return (A. A. Moreno).
28. Preference.
May 12. Preference.
26. Preference.

b

June 8. Motion for record (A. A. Moreno).
23. Preference.

24. Record return.
Oct. 27. 1 commission. 1 plan annexed.
27. 10 commissions. Note of evidence. 2 affidavits.
27. Note of evidence & duplicate. 2 exhibits.
Nov. 15. Judgment.
21. Judgment signed.
28. Motion and Bond of Appeal.

1	Transcript	$57.00
	Binding	1.00
		$58.00

BARRY.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans:

Civil District Court for the Parish of Orleans.

Petition and Two Bills of Lading.

Filed May 28th, 1909.

Civil District Court, Division "E."

No. 89927.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS AND NORTHEASTERN R. R. Co. and SOUTHERN RAILWAY.

To the Honorable the Judges of the Civil District Court for the Parish of Orleans, State of Louisiana:

The petition of the National Rice Milling Company, a corporation duly organized under the laws of the State of New Jersey and domiciled in the said State of New Jersey, but doing business in the City of New Orleans, La., herein appearing through Henry Kahn, its President, with due respect, represents:—

2 That the New Orleans & Northeastern Railroad Company, a corporation organized under the laws of the State of Louisiana and domiciled and doing business in the City of New Orleans, and the Southern Railway, a foreign corporation, doing business within the State of Louisiana and having an agent in the City of New Orleans upon whom service of citation can be made, are justly and legally indebted unto your petitioner, jointly and in solido, in the full sum of Two Thousand Four Hundred Eighty-seven Dollars and Fifty Cents ($2,487.50), for this, to-wit:

That on or about August 21st, 1908, your petitioner shipped via. the New Orleans & Northeastern Railroad Company a certain car-

load of rice, to-wit: Three Hundred (300) pockets of clean rice in C. N. O. & T. P. car 15545, consigned to shipper's order, notify Carolina Rice Company, Charleston, S. C., all as will more fully and at large appear by reference to the bill of lading for said car load of rice hereto attached and made a part hereof as Exhibit A, said rice being of the value of $1,050.00; and that on or about August 22nd, 1908, your petitioner shipped via. the New Orleans & Northeastern Railroad Company a certain car load of rice, to-wit: Four hundred (400) pockets of clean rice in A. G. S. car 12406, consigned to shipper's order, notify Fiedman Company, Charleston, S. C., all as will more fully and at large appear by reference to the bill of lading for said car load of rice hereto attached and made a part hereof as Exhibit B, said rice being of the value of $1,437.50.

Now your petitioner avers that the said rice was never delivered at Charleston, S. C., but your petitioner is informed and so alleged that the said two car loads of rice were destroyed at Hamburg, S. C., on or about August 26th, 1908, while in the possession of the Southern Railway, and your petitioner specially avers that the destruction of the said rice was due solely to the negligence, fault
3 and want of care of the said Southern Railway, its agents, servants and employés.

And petitioner further avers that Section 7 of the Act of Congress of June 29th, 1906, amending Section 20 of the Act of Congress of February 4th, 1887, provides:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or a bill of lading therefor and shall be liable to the lawful holders thereof for any loss, damage, or injury to such property caused by it, or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed, provided that nothing in this section shall deprive any holder or such receipt or bill of lading of any remedy or right of action which he has under existing law."

Petitioner further alleges that the New Orleans & Northeastern Railroad Company is therefore liable to it, jointly and in solido with the Southern Railway for its loss and damage resulting from the destruction of said rice.

Petitioner further alleges that it never parted with its ownership in or title to the said rice; petitioner further alleges amicable demand and failure to pay.

Wherefore, petitioner prays that said defendants may be cited through their proper officers to appear and answer to this demand, and that after trial had there be judgment in favor of your petitoner and against the New Orleans & Northeastern Railroad Company and the Southern Railway, jointly and in solido, for the full sum of $2,487.50, with legal interest from judicial demand.

And petitioner further prays for all costs and for full and general relief.

(Signed) W. CATESBY JONES,
" IRVING R. SAAL,
Attorneys.

4 *Bills of Lading (Two), Annexed to and Made Part of Petition.*

Filed May 28th, 1909.

(Here Follow Bills of Lading, Marked Page 4.)

5 *Answer of the N. O. & N. E. R. R. Company.*

Filed June 8th, 1909.

Civil District Court, Division "E."

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. et als.

And now into Court comes the New Orleans & Northeastern Railroad Company herein represented by its President D. D. Curran, and, for answer to Plaintiff's petition, says that as to this Respondent said petition discloses no cause of action.

Wherefore, Respondent prays that Plaintiff's demand be rejected, that he be condemned to pay the costs thereof; and for all general and equitable relief.

N. O. June 7th, 1909.

(Signed) HALL & MONROE,
Attorneys.

Answer of Southern Railway Company.

Filed June 8th, 1909.

No. 89927.

Civil District Court, Division "E."

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD Co. et al.

And now into Court comes the Southern Railway Company made defendant herein, represented by its President W. W. Finley and,

for answer to plaintiff's petition, denies all and singular the allegations thereof, except in so far as may be hereafter admitted.

Respondent admits that it received the cars of rice in ques-
6 tion, and conveyed the same in safety to Hamburg, S. C. where there was an extraordinary and unprecedented flood which could not have been anticipated and which sudden flood reached a car load of lime; properly placed, and, setting fire to the same, caused the destruction of twenty-five cars among which the two cars in question; and

Respondent avers that this happened without any contributory negligence on its part, and that the said sudden and unprecedented flood which could not have been anticipated, with the result and fire, was the approximate cause of the destruction of the Plaintiff's property.

Respondent avers that the said cars were not unreasonably delayed and that nothing could have been done by Respondent which was not done to save the said property;

Respondent avers, that under the limitations and exemptions in the bill of lading herein sued upon, it is not responsible.

Wherefore, Respondent prays that Plaintiff's demand be rejected, that he be condemned to pay the costs thereof and for all general relief.

New Orleans, June 7th, 1909.

(Signed) HALL & MONROE,
Attorneys.

7 Civil District Court, Division "E."

No. 89927.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. et al.

Testimony for Plaintiff, in the Above-numbered and Entitled Cause, Taken in Open Court on the 3rd Day of March, 1910, *Before the Honorable George H. Theard, Judge.*

Present:

W. Catesby Jones, Esq., for plaintiff.
Harry H. Hall, Esq., for defendant.

ASA S. KENNEDY, being duly sworn by the Minute clerk testified as follows:

By Mr. JONES:

Q. Mr. Kennedy, are you in the employ of the National Rice Milling Company?

A. Yes, sir.

Q. I hand you certain bills,—cars of rice shipped to Charleston,

South Carolina, about which this suit is brought, and ask you if that is the correct charge, $1,050.00?

A. Yes, sir; one of them is $1,050.00, less freight allowance, $69.00.

Q. Here is another bill, A. G. S. car: what does that show?

A. The amount is $1,437.50, less freight $92.00.

Q. In other words, I understand this freight was not prepaid?

A. No, sir; the freight was allowed.

By Mr. HALL:

Q. That is the correct value of the rice?

A. Yes, sir.

Q. The correct value?

A. Yes, sir.

Q. And the real market value of the rice?

A. Yes, sir.

By Mr. JONES: I offer in evidence the bills referred to by the witness,—"P-1" and "P-2."

8 (Endorsed:) No. 89,927—Civil District Court, Div. E.—National Rice Milling Co. vs. N. O. & N. E. R. R. Co. et als.—Evidence of plaintiff.—89927.—Filed Oct. 27, 1910.—(Signed) A. H. Fleming, D. C.

(Two Bills) Offered in Evidence by Counsel for Plaintiff.

Filed October 27th, 1910.

All reclamations must be made within five days after receipt of goods. Our responsibility ceases when we furnish clean bill-of-lading or receipt from the initial transportation line. No allowance will be made for short weights unless claim is accompanied by itemized weight certificates, and Railroad expense bills with proper exceptions, and positively no claim for shortage or damage will be allowed where consignees give transportation company clean receipt without exceptions.

Cable Address:
"Birleis," New Orleans.

Henry Kahn, President,
Albert Baldwin, Jr.,
Vice Prest.
P. P. Lynch, Sect. & Treas.

Gold Medal Awarded,
(Highest Award) Louisiana
Purchase Exposition,
St. Louis, Mo., 1904.

Gold Medal Awarded,
(Highest Award) Lewis &
Clark Centennial Exposition
Portland, Oregon, 1905.

NATIONAL RICE MILLING COMPANY.

General Offices, 542 Montegut St.

Sales Department, 235 North Peters St.

(Telephone Trunk Lines—Hemlock 722-723.)

Private Code:
A. B. C. 4th Edition
and Lieber's Code Used.

Mills:
Mill "A" New Orleans, La.
St. Louis Mill, New Orleans, La.

Pembroke Mill, Crowley, La.
Irrigation Plant No. 1,
Jennings, La.

Offices:
New Orleans, La., 235 North
Peters Street,
New Orleans, La., 542 Montegut St.
(P. O. Box 122, New Orleans).
Jennings, La., and Houston, Tex.

NATIONAL RICE MILLING COMPANY.

THIS PAGE BOUND VERTICAL IN BOOK

Address all communications to
SALES DEPARTMENT.

NEW ORLEANS, LA., 8/18, 1908.

Sold by A. Tobias Son Co.

No. 40. Sold to Carolina Rice Co.,

Charleston, S. C.

Terms: S. D./B. L.

All remittances and payments must be made direct to the Company at New Orleans, as no Agents or Brokers are authorized to make any allowance or collections for our account.

Pkts.			
300	Type No. 15	30000 3½¢	$1,050.00
		Less freight @ 23¢.....	69.00
			$981.00

Car C. N. O. & T. P. # 15545.

"Copy."

[Endorsed:] No. 89927. Civil District Court, Parish of Orleans. Filed October 27, 1910. (Sg.) A. H. Fleming, Dy. Clerk.

All reclamations must be made within five days after receipt of goods. Our responsibility ceases when we furnish clean bill-of-lading or receipt from the initial transportation line. No allowance will be made for short weights unless claim is accompanied by itemized weight certificates, and Railroad expense bills with proper exceptions, and positively no claim for shortage or damage will be allowed where consignees give transportation company clean receipt without exceptions.

THIS PAGE

BOUND IN BOOK

NATIONAL RICE MILLING COMPANY.

Cable Address:
"Birleis," New Orleans.

Private Code:
A. B. C. 4th Edition
and Lieber's Code Used.

Henry Kahn, President,
Albert Baldwin, Jr.,
Vice Prest.
P. P. Lynch, Sect. & Treas.

General Offices, 542 Montegut St.

Sales Department, 235 North Peters St.

(Telephone Trunk Lines—Hemlock 722-723.)

Mills:
Mill "A" New Orleans, La.
St. Louis Mill, New Orleans, La.

Gold Medal Awarded,
(Highest Award) Louisiana
Purchase Exposition,
St. Louis, Mo., 1904.

Pembroke Mill, Crowley, La.
Irrigation Plant No. 1,
Jennings, La.

Gold Medal Awarded,
(Highest Award) Lewis &
Clark Centennial Exposition
Portland, Oregon, 1905.

Offices:
New Orleans, La., 235 North
Peters Street,
New Orleans, La., 542 Montegut St.
(P. O. Box 122, New Orleans).
Jennings, La., and Houston, Tex.

Address all communications to
SALES DEPARTMENT.

NEW ORLEANS, LA., 8/19/1908.

Sold by A. Tobias Son Co.

No. 43. Sold to The Tiedeman Co.,
Charleston, S. C.

Terms: S. D. B. L.

All remittances and payments must be made direct to the Company at New Orleans, as no Agents or Brokers are authorized to make any allowance or collections for our account.

Pkts.			
300	Type No. 8	30000 3½	$1,050.00
100	Type No. 7	10000 3⅞	387.50
			$1,437.50
		Less Freight @ 23¢	92.00
			$1,345.50

Car A. G. S. # 12406.

"Copy."

[Endorsed:] No. 89927. Civil District Court, Parish of Orleans. Filed October 27, 1910. (Signed) A. H. Fleming, Dy. Clerk.

THIS PAGE BOUND VERTICAL IN BOOK

10 Civil District Court, Division "E."

No. 89927.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. et al.

Note of Evidence for Defendants, in the Above-numbered and Entitled Cause, Taken in Open Court on the 3rd Day of March, 1910, Before the Honorable George H. Theard, Judge.

Present:
W. Catesby Jones, Esq., for plaintiff.
Harry H. Hall, Esq., for defendants.

By Mr. HALL: Counsel for defendants offers in evidence the testimony taken under commission of T. J. Hayhoe, H. L. Thompson, H. W. Taylor, G. A. Benson, W. H. Dent, M. J. Marcus, H. L. Hungerford, D. W. Newell, J. R. Anderson, J. D. McElroy, L. E. Campbell, P. C. Martin, P. J. Pfeiffer, Grandville Beal, J. C. Parks, W. R. Parks, W. F. Taylor, J. R. Blackwell, C. W. Sykes, J. R. Southhall, C. J. Blount, together with the exhibits annexed to said testimony and the blue-print marked "Exhibit A" and identified by J. M. Hull, Jr., Commissioner.
Affidavits of S. N. Morris & Hugh O'Neal, "R. R. 2."

NOTE. Case continued for argument.

No. 89,927. Civil District Court. Parish of Orleans. Filed Oct. 27, 1910. (Sg.) A. H. Fleming, D'y Clerk.

11 *Deposition of T. J. Hayhoe, Taken Under Commission Issued November 30th, 1909; Offered in Evidence by Counsel for Defendants.*

Filed October 27th, 1910.

Civil District Court for the Parish of Orleans.

No. 89927.

The State of Louisiana. To any Notary Public in Memphis, Tennessee, Greeting:

Know Ye That we, reposing confidence in your prudence and fidelity, do, by these presents, give unto you authority diligently to examine all witnesses whatever, as well on the part of the plaintiff as of the defendant, in a certain suit now pending in the Civil District Court for the Parish of Orleans, wherein The National Rice Milling Co. is plaintiff and The New Orleans & Northeastern Railroad Co. and the Southern Railway, are defendants.

Witness, T. J. Hayhoe, Memphis, Tennessee.

Therefore, We desire you, that at certain times and places, by you to be appointed, for that purpose, you cause the said witnesses to come before you, that you then and there examine them apart upon their respective corporeal oaths first taken before you upon the Holy Evangelists; that you reduce their examination to writing; and cause the witnesses to sign the same; and when you shall so have taken them, that you send the same, with this commission, closed up under your seal, to us in our Civil District Court in the City of New Orleans, without delay.

Witness the Honorable George H. Theard, Judge of said Court, this 30th day of November, in the year of our Lord one thousand nine hundred and nine, and in the 134th year of the Independence of the United States.

(Signed) J. P. DONAHUE, [SEAL.]
Deputy Clerk.

12 Civil District Court, Divison —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. et al.

Interrogatories to Be Propounded to T. J. Hayhoe, on Behalf of the Defendant, the Said Witness Residing at Memphis, Tenn., His Answers Thereto to Be Received by Any Notary Public in Memphis, Tenn., and to Be Read in Evidence on the Trial of This Cause:

Interrogatories.

Inty. No. 1. What is your name, age and occupation?

Inty. No. 2. Where were you and what was your occupation, August 25th, 26th, 27th, and 28th, 1908?

Inty. No. 3. If you say that at the time in question, you were yard master for the Railroad Company at Hamburg, S. C., state what was the condition of the yards at that time?

Inty. No. 4. What were your regular hours for being on duty as yardmaster in the Hamburg yards during August, 1908, and who had charge of the yards during the night?

Inty. No. 5. What engine, crew, if any, were on duty during the hours of the day and night in August 1908, at the Hamburg Yards of the Southern Railway Company?

Inty. No. 6. If you state in answer to the foregoing interrogatory or interrogatories that the Savannah River, at the time named, was above its normal height, state fully if you had ever on former occasions seen a material rise in the river and to what extent and state what was the greatest flood you have ever seen.

13 Inty. No. 7. How often before August 1908, if ever, you had ever seen the river rise in the Hamburg yards so as to flood the tracks?

Inty. No. 8. What was the condition of the river on the night of August 25th, when you went off duty, and what reason, if any, had you to anticipate the flood which took place on the ensuing day?

Inty. No. 9. State fully what knowledge or information you had on the subject and what you did?

Inty. No. 10. What time did you arrive on the morning of August 26th and how near the river did you reside?

Inty. No. 11. When you went on duty at seven o'clock of August 26th, what was the condition of the river?

Inty. No. 12. State fully and in detail what reason you had to apprehend during the preceding night or during the day of August 26th, a great rise or freshet in the river?

Inty. No. 13. What steps, if any, did you take to protect the property of the Southern Railway in the Hamburg yards and particularly its cars loaded with freight?

Inty. No. 14. Were any cars lost or destroyed in consequence, directly or indirectly of the flood in question?

Inty. No. 15. If any cars were lost and destroyed, how many and where were they, and if any of the cars were consumed by fire, state which cars and what was the cause of the fire?

Inty. No. 16. This suit is brought to recover the value of certain pockets of rice alleged to have been destroyed in the Ham-
14 burg yards on the 26th of August, the defense being that the cars containing the said rice being A. G. S. 12406 and C. N. O. 15545 were consumed by fire caused by the flood igniting lime in a car adjacent. State what you know of the location of the different cars which were destroyed or damaged and state fully how long the cars had been in the position indicated and whether or not they were ready to be moved on orders of the train dispatchers?

Inty. No. 17. State fully any facts within your knowledge which would assist the defendant in making out its said defense?

(Signed) HALL & MONROE,
Attorneys for the Defendant.

It is hereby agreed that a commission issue herein as above without motion, affidavit or fixing of return day and that the seal and signature of the Notary executing the said commission be considered full proof of his official capacity.

(Signed) W. C. JONES,
I. R. SAAL,
Attorneys for Plaintiff.

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
versus
NEW ORLEANS & NORTHEASTERN R. R. Co. et al.

Cross-Interrogatories to Be Propounded to T. J. Hayhoe, a Witness on Behalf of Defendant.

15 No. 1. State fully all of your occupations and employments prior to August 25, 1908, giving the name of your employer, the capacity in which you were employed, and the city or locality in which your duties were exercised.

No. 2. State by what railroad company, if any, you were employed at Hamburg, S. C., on August 25th, 26th, 27th and 28th, 1908.

No. 3. State fully the extent and dimensions of the railroad yards under your control or supervision as yardmaster, the location of the river relative thereto, the number of tracks contained in the said yard, the number of cars that the said tracks could accommodate, and the direction of the said tracks relative to the river attaching to your answers a sketch of the said yards and fully explain all the details thereof.

No. 4. State in detail the number of cars in the said yards on August 25th, 26th, 27th and 28th, 1908, giving the number and initial of each car, and state also the exact position in the yards of each particular car on the above mentioned four days, stating the hour and day on which each of the said cars arrived in the yards.

No. 5. If in answer to interrogatory No. 6, you state that you had, on former occasions, seen a material rise on previous floods in the Savannah River, give specific information as to these previous floods, stating the height at which the water reached, and stating particularly the amount of rain fall preceding these previous floods, and the amount of rain fall preceding the flood of August, 1908.

16 No. 6. If an answer to interrogatory No. 7, you state you have seen the river rise in the Hamburg yards so as to flood the tracks, state the rate at which the river rose on each occasion, giving the number of inches per hour.

No. 7. If you have made any statements as to the condition of the Savannah river on August 25th and August 26th, please state if your answers are from your personal observations and whether you took any actual measurements of the state of the water, or if your answers are merely based on your impressions.

No. 8. If you have stated in answer to any of the direct interrogatories that certain cars were lost by fire caused by water reaching a car of lime, state the exact time at which the car of lime took fire.

Answers of T. J. Hayhoe.

UNITED STATES OF AMERICA,
State of Tennessee, County of Shelby, ss:

Civil District Court, Parish of Orleans, State of Louisiana, Division, —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, J. E. Dillard, a notary public, did cause to personally come and appear before me on this 10th day of December at the hour of 11 A. M., T. J.
17 Hayhoe, the witness named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross-interrogatories, I did then propound to him the said interrogatories and cross intys., to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

T. J. Hayhoe, age 46, Yardmaster for the Southern Railway Company, Memphis, Tennessee.

To the second interrogatory he answers and says:

Yardmaster at Hamburg, S. C., for the Southern Railway Company.

To the third interrogatory he answers and says:

The condition of the yards was normal.

To the fourth interrogatory he answers and says:

From 7 A. M. to 7 P. M. Switch engine foreman was in charge of the yards at night.

To the fifth interrogatory he answers and says:

One full crew day time and one full crew night and one engine from 12 noon to 12 midnight?

To the sixth interrogatory he answers and says:

I had seen several rises but none out of the banks into the yards. On the 26th of August, 1908 was the greatest flood I had ever seen, but previous to that time had never seen a flood in the river which came out of the banks into the yard, but had seen the river almost out of its banks prior to August 26th.

To the seventh interrogatory he answers and says:

I had never seen the river rise so as to flood the tracks.

To the eighth interrogatory he answers and says:

The river was high but not out of its banks and I had no reason

at that time to anticipate the rise, and to the best of my recollection it was not raining that night.

18 To the ninth interrogatory he answers and says:

I received a message from the Superintendent on the evening of August 25th that indications were there would be a rise in the Savannah River. I watch-- the river until 12 o'clock that night. Until 12 o'clock that night the river was not out of its banks and no indications of any serious rise more than there had been several rises previous to that date.

To the tenth interrogatory he answers and says:

I arrived at 7 o'clock and resided about two squares from the river.

To the eleventh interrogatory he answers and says:

The river was rising rapidly.

To the twelfth interrogatory he answers and says:

I had no reason during the night of August 25th, to anticipate the rise. On the morning of the 26th at 7 A. M., the river was rising rapidly and in thirty-five minutes it rose so rapidly it covered a switch stand.

To the thirteenth interrogatory he answers and says:

The cars that were loaded with freight were in what was known as old Hamburg yards and when I came on duty and saw that the river was rising rapidly, at once took an engine and tried to reach the cars. On the lead from the main track to old Hamburg there are three trestles. One of these was undermined by the rapid running water so that I could not get an engine over the trestle to reach the cars. I got a cut of cars and tried to reach the cars in Hamburg yard over the trestle but could not on account of the rapid rising water and the trestle unsafe. I moved all other cars that I could reach on to high ground and weighted down the main track trestles with cars and one trestle in the old Hamburg yard.

19 To the fourteenth interrogatory he answers and says:

Yes.

To the fifteenth interrogatory he answers and says:

I think there were thirty-seven cars in old Hamburg yards destroyed, to the best of my recollection, by fire caused by the water reaching a car of lime and slacking the lime and setting fire to the car. There were no cars destroyed by water.

To the sixteenth interrogatory he answers and says:

The cars that were in the old Hamburg yard were made up in a train ready to be moved at the order of the dispatcher but as to how long they had been in the position indicated, I cannot say without consulting records.

To the seventeenth interrogatory he answers and says:

I know of several instances of loss by the flood that looked as if people that had lived in Augusta for years did not anticipate for the reason that the Riverside Mills were almost ruined, the C. & W. C. Riverside yard was almost completely wiped out and several cars washed down the river. Several wholesale houses located in the heart of the city, for instance, Dicks was badly damaged by the flood; Nixon's wholesale house was set on fire by lime, although when the

water rose so rapidly they endeavored to move their goods to higher ground, but on account of the rapid rise of the water they were unable to do so. The water reached their lime, slacked it and set fire to the building and several men drowned trying to escape from the building. I know this because I was there and saw it.

20 To the first cross-interrogatory he answers and says:

I started as a call boy for the C. & N. W. at Chicago when I was thirteen years old, in 1876. Later, I was a switch engine fireman and switch engineer for the same road, then I went in the employ of the F. & P. M., it was at that time, at Saginaw, Mich., as brakeman, later a freight conductor, then passenger conductor for the same road, then I went with the Northern Pacific at Brainerd, Minn. as engineer and was there a little over two years. Then I went in the employ of a contractor building the Pacific Division of the Northern Pacific from Columbia River to Seattle. Then I went to Broadview, Northwestern Territory, Canada, as work train conductor building the Canadian Pacific Railway. I left there and went to Bay City, Mich. as night Yardmaster for the Michigan Central Railroad. From there to Detroit as Night General Passenger Yardmaster, transferred from there to St. Thomas, Canada as General Yardmaster. Then was made Traveling General Yardmaster for the whole Michigan Central System. Then was reduced on account of dull times to General Yardmaster, then took service with the C. H. & D. at Cincinnati as Terminal Trainmaster and remained there twelve years. Then I took service with the Chicago, Cincinnati & Louisville as Assistant Superintendent of Construction. Then I took service with the Missouri Pacific as Superintendent of Terminals at Little Rock, Arkansas. Then I was Yardmaster at Hamburg.

To the second cross interrogatory he answers and says:

I was employed by the Southern Railway Company as Yardmaster at Hamburg.

To the third cross interrogatory he answers and says:

21 I answer this by attaching blue print as Exhibit No. 1 to my deposition and which is a correct blue print giving answers to this question, with the exception of one track, which I cross-mark, which track was not there at the time I was Yardmaster, and which runs from the coal chute to the main track at the yard office. I cannot state definitely the number of cars the track would hold.

To the fourth cross-interrogatory he answers and says:

I cannot answer without consulting records.

To the fifth cross-interrogatory he answers and says:

I have seen the river rise several times previous to August 26, 1908, and had heavier rains than we had then in and around Augusta and Hamburg and the river never left its banks. I do not know the exact height to which the water rose on those previous occasions prior to August 26th.

To the sixth cross-interrogatory he answers and says:

I never saw the river rise into the yard previous to August 26th, 1908.

To the seventh cross-interrogatory he answers and says:

My answers are based on my personal observations but I took no measurements.

To the eighth cross-interrogatory he answers and says:

About 5 P. M. of August 26th, 1908. The water had reached that car before that time, but you see it was slacking away and hadn't got to going.

And further Respondent saith not.

22 (Signed) T. J. MAYHOE.

All of which above answers were reduced to writing at my instance and request in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office. this 14th day of December, 1909.

(Signed) J. E. DILLARD,
[SEAL.] *Notary Public.*

23 EXHIBIT No. 1 (Blue Print, Attached to Foregoing Answers of T. J. Mayhoe).

Filed October 27th, 1910.

(Here follows map marked p. 23.)

24 *Depositions of Harry L. Thompson and Others, Taken under Commission Issue- November 30th, 1909, Offered in Evidence by Counsel for Defendants.*

Filed June 9th, 1910.

Commission.

Civil District Court for the Parish of Orleans.

No. 89927.

The State of Louisiana to J. M. Hull or any other Notary Public in Augusta, Ga., Greeting:

Know Ye That We, reposing confidence in your prudence and fidelity, do by these presents, give unto you authority diligently to examine all witnesses whatever, as well on the part of the plaintiff as of the defendants, in a certain suit now pending in the Civil District Court for the Parish of Orleans, wherein The National Rice Milling Co. is plaintiff, and The New Orleans & Northeastern Railroad Co. and The Southern Railway, are defendants.

Witnesses: Harry L. Thompson, Henry W. Tyler, G. A. Benson, W. H. Dent, M. J. Marcus, H. L. Hungerford, D. W. Newell, J. R. Anderson, J. D. McElroy, L. E. Campbell, E. K. Chapman,

P. C. Martin, P. J. Pfieffer, Greenville Beal, R. J. Robertson, W. A. Howle, J. C. Parks, W. F. Taylor, J. R. Blackwell, C. M. Sykes, J. R. Southall and C. J. Blunt.

Therefore, We desire you, that at certain times and places, by you to be appointed, for that purpose, you cause the said witnesses to come before you, that you then and there examine them apart upon their respective corporal oaths first taken before you upon the Holy Evangelist; that you reduce their examination to writ-
25 ing, and cause the witnesses to sign the same; and when you shall so have taken them, that you send the same, with this commission, closed up under your seal, to us in our Civil District Court in the City of New Orleans, without delay.

Witness the Honorable George H. Theard, Judge of said Court this 30th day of November, in the year of our Lord one thousand nine hundred and nine, and in the 134th year of the Independence of the United States.

(Signed) J. P. DONAHUE,
Deputy Clerk. [SEAL.]

Interrogatories to be Propounded to Harry L. Thompson, Henry W. Tyler, G. A. Benson, W. H. Dent, M. J. Marcus, H. L. Hungerford, D. W. Newell.

Civil District Court, Division "E."

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. et al.

Interrogatories to Be Propounded to Harry L. Thompson, Henry W. Tyler, G. A. Benson, W. H. Dent, M. J. Marcus, H. L. Hungerford, D. W. Newell, the Answers to the said Interrogatories to Be Taken by J. M. Hull, Notary Public in Augusta, Ga., or Any Other Notary in the said City, the Same to Be Read in Evidence on the Trial of This Cause.

Interrogatories.

Inty. No. 1. What is your name, age, and occupation?

Inty. No. 2. Where were you, on the 25th, 26th, and 27th of August 1908?

Inty. No. 3. This suit is brought to recover the value of certain rice alleged to have been destroyed in the Hamburg yards of
26 the Railroad Company on or about the 26th of August 1908. The defense is that the loss in question was occasioned by an unexpected and unprecedented rise in the river which flooded the Hamburg yards, setting fire to a car load of lime and resulting in the destruction by fire of the rice in question. State fully what was

the condition of the railroad yards at Hamburg at the time in question and what was the condition of the river?

Inty. No. 4. If you say that the yards in question were flooded and the river high, state how the flood compared with preceding floods?

Inty. No. 5. Was anything done by the Railroad Company to save its cars or the rice in question? If so, what was done?

Inty. No. 6. If you have a plan or blue print of the yards in question, please annex the same to your answers and indicate in your testimony the location of the cars which were destroyed by reference to the said sketch or blue print?

Inty. No. 7. State fully anything you know concerning conditions at the place and time in question which would assist defendant- in making out *its* said defense.

(Signed) HALL & MONROE,
Attorneys for the Defendants.

It is hereby agreed that a commission issue herein as above, without motion, affidavit or fixing the return day and that the
27 seal, and signature of the Notary executing the said Commission be considered full proof of his official capacity.

(Signed) W. C. JONES,
I. R. SAAL,
Attorneys for Plaintiff.

Civil District Court, Division "E."

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. et al.

Cross-interrogatories to Be Propounded to Harry L. Thompson, Henry W. Tyler, G. A. Benson, W. H. Dent, M. J. Marcus, H. L. Hungerford, D. W. Newell, Witnesses on Behalf of Defendant-.

No. 1. If in answer to direct interrogatory No. 4, you have stated that the flood exceeded other floods, give full data as to the amount of rain fall of this and other floods, and state the rate at which the river rose, by giving measurements of its rise each hour as respect- this flood and all other previous floods to which you have referred.

Civil District Court, Div. "E."

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. COMPANY et al.

Interrogatories to Be Propounded to J. R. Anderson, L. E. Campbell, E. K. Chapman, P. C. Martin, P. J. Pfieffer, Greenville Beal, R. J. Robertson, W. W. Howle, J. C. Parks, W. F.
28 *Taylor, and J. R. Blackwell, the Answers to the said Interrogatories to Be Taken by J. M. Hull, Notary Public, in Augusta, Ga., or Any Other Notary Public in the said City, the Answers Thereto to Be Read in Evidence on the Trial of This Cause.*

Interrogatories.

Inty. No. 1. What is your name, age and occupation?

Inty. No. 2. Where were you in August or about August 22nd, 23rd, 24th, 25th, 26th, 27th, and 28th, 1908?

Inty. No. 3. State fully during those days what was the condition of the weather at the points stated?

Inty. No. 4. If in reply to Interrogatory No. 3 you state that rains prevailed, state to what extent and what effect if any, the said rains had upon the streams or rivers in the neighborhood above mentioned.

Inty. No. 5. This suit is brought for the recovery of certain freight alleged to have been destroyed in the railroad yards at Hamburg, S. C., opposite Augusta, Ga., in August, 1908. The defense is at or about the time specified above, say August 26th, 1908, there was at Augusta, Ga., and Hamburg, S. C. opposite to Augusta, an unprecedented flood of water which could not have been anticipated and which caused the destruction of the rice in question. State fully any further facts within your knowledge which would support this defense.

(Signed) HALL & MONROE,
Attorneys for Defendant-.

29 It is hereby agreed that a commission issue herein as above without motion, affidavit or fixing of a return day, and that the seal of the Notary executing the said commission be considered full proof of his official capacity.

(Signed) W. C. JONES,
I. R. SAAL,
Attorneys for Plaintiff.

Civil District Court, Division "E."

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. et al.

Cross-Interrogatory to be Propounded to J. R. Anderson, J. D. McElroy, L. E. Campbell, E. K. Chapman, P. C. Martin, P. J. Pfieffer, Greenville Beal, R. J. Robertson, W. A. Howle, J. C. Parks, W. F. Taylor, and J. R. Blackwell, Witnesses on Behalf of Defendant.

No. 1. If in reply to direct interrogatory No. 4, you have stated that the streams of river had risen as result of rains, state full particulars of said rise, giving the number of inches per hour that the streams had risen, owing to such flood.

Civil District Court, Division "E."

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. COMPANY et al.

Interrogatories to be Propounded to C. M. Sykes, J. R. Southall and C. J. Blunt, the Answers to the said Interrogatories to Be Taken by J. M. Hull, Notary Public, in Augusta, Ga., or any Other Notary Public in the said City, the Same to be Read in Evidence on the Trial of This Cause.

Interrogatories.

Inty. No. 1. What is your name, age and occupation?

Inty. No. 2. Where were you on the 25th, 26th, 27th, and 28th of August 1908?

Inty. No. 3. This suit is brought to recover the value of certain rice alleged to have been destroyed in the Hamburg yards of the Railroad Company on the 26th of August 1908. The defense is that the rice in question, was contained in car A. G. S. No. 12406 consigned to Tiedemann & Co., and C. N. O. car No. 15545 consigned to the Carolina Rice Company both of said consignees being in Charleston, S. C. and that the said rice was destroyed by fire caused by the ignition of quick lime in a car flooded by high water. If you know of the conditions above referred to, state fully what was the movement of said cars and how and when they were injured?

Inty. No. 4. State fully any further facts within your knowledge which may assist the defendant in making out its defense that the

loss in question was caused by an unprecedented rise in the river and a flood that could not have been anticipated and the damage from which could not have been avoided.

(Signed) HALL & MONROE,
Attorneys for the Defendants.

31 It is hereby agreed that a commission issue herein as above without motion, affidavit or return day, and that the seal and signature of the Notary executing the said commission be considered full proof of his official capacity.

(Signed) W. C. JONES,
I. R. SAAL,
Attorneys for Plaintiff.

Answers of H. L. Thompson.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910, at the hour of 10 o'clock, H. L. Thompson, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross-interrogatories, I did then propound to him the said interrogatories and cross-interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

32 My name is H. L. Thompson, 35 years of age, and I am employed as a switchman by the W. & A. Railway Company at Atlanta, Ga.

To the second interrogatory he answers and says:

On the 25th, 26th and 27th of August, 1908 I was working for the Southern Railway Company at Augusta, Ga.

To the third interrogatory he answers and says:

The Hamburg yard was submerged by water to a height which put the water several inches in the freight cars which were standing on the tracks in said yards. I had been living in Augusta for about 20 years and the river was a great deal higher than I have ever seen it. The current of the river was very swift through the Hamberg yard.

To the fourth interrogatory he answers and says:

I have no record of the exact height of any previous high water, but, as stated above, the flood of 1908 was by far the highest and most destructive that I have ever seen.

To the fifth interrogatory he answers and says:

We did everything that could be done, short of risking human life. I was working as conductor on switch engine No. 1553. We reported for work at 7 o'clock on the morning of the 26th. We report on the Georgia side of the river and take our engine out of the yards there over to Hamburg. The engineer has to oil up his engine, etc., and on the morning in question we reached the Hamberg yard at about 7:20 A. M., just ahead of the passenger train, which was leaving Augusta for Charleston, S. C. Upon reaching the Hamberg yard we had to get off of the main line on to a side track in order to allow the passenger train to go by. At that time the tracks and switches were under water and in order to get
33 to the old Hamberg yard, where the freight cars were, we had to change two switches. This necessitated cleaning out the mud and sand from between the switch rails and consumed some little time. We then proceeded slowly up towards the old Hamberg yard for the purpose of pulling out the cars which were there. To get to the old Hamberg yard and get at the cars there our engine had to pass over three trestles. The first of these Trestles was the scale trestle and when we passed over it, it went down about six or seven inches, showing that the trestle had been undermined. When we reached the next trestle and pushed the tender upon it (we were running with the tender ahead), this trestle sank about 10 inches, and we were afraid to proceed any further. We feared that the engine might turn over. The engineer, the fireman and myself were at this time all upon the top of the tender ready to jump off if the engine turned over. Seeing that we could proceed no further, the engineer jumped in his cab and stopped the engine. Then we proceeded back along the way we had come, and in passing over the scale trestle we noticed that it went down further than when we passed over it going towards the old Hamberg yards. By this time the water was much higher and was running through the ash pan of the engine. I think we got out just in time to avoid being caught on the engine. We next got hold of three gravel cars and pushed them on to the scale trestle to hold it down and keep it from floating away. The other trestles all washed away. I remained working in the Hamberg yard until about 11 o'clock but the water had risen so high and the current was so swift that we could do nothing to save the freight. We did not, however, at any time think that the water would rise sufficiently high to get into the
34 freight cars. When I left the Southern Railway yard, I did so in order to go to the assistance of my wife, mother, sister and child, all of whom were in a house which was in the flood district, and when I reached home the water was within 3 or 4 inches of the floor and within an hour it was running several inches in the house. I had to move furniture, provisions, etc. to the second story where we remained until the flood subsided. In my opinion noth-

ing could have been done to save the freight in the cars because the water rose so rapidly and suddenly.

To the sixth interrogatory he answers and says:

The blue print attached to the interrogatories addressed to H. L. Hungerford is a blue print of the yard in question. The cars were located on tracks No. 1 and 5 in the old Hamberg yard, which is designated upon the blue print.

To the seventh interrogatory he answers and says:

I have stated about everything that I know bearing upon this question.

Cross-interrogatories:

To the first cross-interrogatory he answers and says:

I can not give the data asked for because I have not the records of rain fall, rate at which the water rose, etc. and have no personal knowledge on this subject.

(Signed) HARRY L. THOMPSON.

All of which above answers were reduced to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office this 31st day of January, 1910.

35 (Signed) JAMES M. HULL, JR., [SEAL.]
Notary Public and Commissioner.

Answers of Henry W. Tyler.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock, Henry W. Tyler, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

Henry W. Tyler, age 34, occupation farmer.

To the second interrogatory he answers and says:

I was employed as a car inspector by the Southern Railway Company at Augusta, Ga.

To the third interrogatory he answers and says:

36 The Southern Railway yard at Hamburg, S. C., was submerged by water on the 26th and 27th of August, 1908. The water rose to the height of about six feet in said yard. There was a very strong current flowing through said yard, which was caused by the fact that lumber, trees and drift wood were banked against the railroad trestle to a height of about six feet. There were two trains of loaded freight cars in said yard ready to go out. These cars were on tracks numbers 1 and 5, I think, in the old Hamburg yard. The river was way out of its banks and finally rose to a height of about 38.8 feet.

To the fourth interrogatory, he answers and says:

The river was higher than I had ever seen it but I had only been living in Augusta since, 1906. I cannot therefore say how it compares with previous floods.

To the fifth interrogatory he answers and says:

When the water rose to a height which put it in the cars standing in the railway yard a fire broke out in one of these cars. As soon as this fire was discovered we endeavored to get a batteau in order to go out there and put the fire out. Telephone communications however, had been abandoned and we had to wait until some one happened to come within calling distance in a batteau. We got to the very first one that we could get and myself together with three other men rowed out to the train of cars that were burning and put the fire out by throwing buckets of water upon it. We stopped the fire just before it reached a car load of sheep and saved them from being burned. The current was very swift and we found this work very dangerous. There was also danger from logs of wood and timber which were floating down with the current.

To the sixth interrogatory he answers and says:

37 Referring to the blue print which is attached to the interrogatories of Mr. H. L. Hungerford, the cars were stationed upon the tracks designated as tracks numbers 1 and 5 in old Hamberg yard.

To the seventh interrogatory he answers and says:

I was not employed at the Hamberg yard on August 25th, 26th and 27th, 1908, but was working at the Union depot, in August. I went to the Hamberg yard, however, or rather upon the trestle between 7 and 8 o'clock A. M. on the morning of August 26th. I remained there so as to be on hand in case I could do anything to help the railroad company. I did help move away the drift wood so as to try and keep an opening under the trestle before I went in the batteau to help put out the fire in the freight car.

Cross-interrogatory:

To the first interrogatory he answers and says:

I cannot give the information asked for in this question.

(Signed) HENRY W. TYLER.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
[SEAL.] *Notary Public and Commissioner.*

Answers of G. A. Benson.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

No. 89927.

38 Civil District Court, Division —.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD Co. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910, at the hour of 10 o'clock, G. A. Benson, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound to him the said interrogatories and cross-interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

G. A. Benson, age 66, occupation car inspector Southern Railway Co.

To the second interrogatory he answers and says:

I was in Hamberg, S. C., part of the time in the Southern Railway yards there.

To the third interrogatory he answers and says:

On the night of August 25th, 1908, there was no water in the Southern Railway Company's yard in Hamberg; the yard was in a perfectly clear condition. On the morning of August 26th, I reported to work at the Hamberg yard at 7 o'clock and at that time the water had just reached the rail in front of the block office. From then on the water rose at an increasingly rapid rate until it finally reached a height of above five and a half feet in the yard. There was a very swift current flowing through the yard after the water
39 had passed the height of about 1 foot. I was working in this same yard during the freshet of 1888, at that time working for the old South Carolina & Georgia Railroad. The current through that yard was not nearly so swift in 1888, and I think the reason

is that there were no mills and lumber yards built in North Augusta then, and therefore there was nothing like the amount of drift wood and lumber against the trestle that there was in 1908. I rowed a batteau all around this yard in 1888 and I also went out in a batteau in 1908, and I know that the current was much swifter and more dangerous in 1908 than it was in 1888. The river was also higher in 1908 than it was in 1888.

To the fourth interrogatory he answers and says:

The flood of August 1908 was the highest and most destructive flood that I have ever seen on the Savannah River.

To the fifth interrogatory he answers and says:

About 8:30 A. M. of the morning of August 26th, I saw engineer Dent and his crew attempt to reach the cars which were stationed on track numbers one and five in the old Hamberg yard. When the tender of the engine was pushed upon the scale trestle I saw it sink several inches, and a few minutes later I saw them abandon this effort to reach the cars in the old Hamberg yard. In the afternoon, i. e. about 2 o'clock, after the water had risen to a height which put it into the freight cars, a fire broke out in one of these cars. We were unable at that time to get a batteau and in fact had we gotten one the current was so swift, that we would have been unable to have rowed out to where the cars were burning without capsizing. The next morning, however, we got a boat and myself together with three other men rowed out to the cars and put the fire out by throwing buckets of water on it. We saved one car of like stock, and several empty cars, but about 29 cars had been consumed by the fire.

To the sixth interrogatory he answers and says:

Referring to the blue print attached to the interrogatories of Mr. H. L. Hungerford, the cars which were destroyed were standing upon the track number five in the place designated on said blue print as Old Hamberg yard.

To the seventh interrogatory he answers and says:

I have stated above everything that I know about this matter, which I think would throw any light upon this case.

Cross-interrogatory:

To the first cross interrogatory he answers and says:

I am unable to give the record asked for in this question.

(Signed) G. A. BENSON.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner.

41 *Answers of W. H. Dent.*

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

No. 89927.

Civil District Court, Division —.

NATIONAL RICE MILLING COMPANY,
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD Co. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock, W. H. Dent, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

W. H. Dent, age 40, occupation engineer in the employment of the Southern Railway.

To the second interrogatory he answers and says:

Working for the Southern Railway Company at Augusta, Ga. and part of the time in the Hamberg yard, South Carolina.

To the third interrogatory he answers and says:

On August 25th, 1908, the Hamberg yard was dry and entirely clear of water. On the morning of August 26th, 1908 I reported to
42 work at the Reynolds street office on the Augusta side of the river at 7 o'clock A. M. As soon as I had oiled my engine we went across to the Hamberg yard. Upon arriving there we had to get off of the main line on to a side track in order to allow the out going passenger train to go by. By this time the rails and switches in the Hamberg yard were covered by water and in order to get to the tracks upon which the loaded freight train was standing—and which we were going to try and remove—we had to change two switches. Some time was consumed in cleaning out the mud and sand from between the switch rails and by the time we reached the scale trestle, which had to be passed over, before reaching the Old Hamberg yard, said trestle was entirely submerged by water. I was pushing the tender in front of my engine and when the tender ran upon the trestle it sank some 12 or 14 inches, showing that it had been undermined by the current of water which was now flowing through the yard or was floating. The water was rising very rapidly and when we reached the next trestle, I saw that it

could not be passed in safety. I therefore backed my engine off of this track and pushed 3 or 4 gravel cars upon the floating scale trestle which was thus saved from being washed away. The other trestles were entirely destroyed or washed away. Seeing that I could be of no further assistance in the Hamberg yard owing to the height of the water and the swiftness of the current through said yard, I left and went to my home to look after the welfare of my wife and children.

To the fourth interrogatory he answers and says:

The Savannah River in August 1908 was a great deal higher than I had ever seen it before although I had been living in Augusta for a period of twelve years.

To the fifth interrogatory he answers and says:

I have already answered this question in the statements
43 made by me in answer to question number 3.

To the sixth interrogatory he answers and says:

Referring to the blue print attached to the testimony of H. L. Hungerford, the cars which were destroyed were standing upon the track designated as track number five in the old Hamberg yard, as shown upon said blue print.

To the seventh interrogatory he answers and says:

I know of nothing further to state.

Cross interrogatory:

To the first cross interrogatory he answers and says:

I cannot give the records asked for in this question.

(Signed) W. H. DENT.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

Answers of M. J. Marcus.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY,
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the an-
44 nexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested,

I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910, at the hour of 10 o'clock, M. J. Marcus, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross-interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

M. J. Marcus, age 34, occupation, agent of Southern Railway at Denmark, S. C.

To the second interrogatory he answers and says:

I was employed as night operator in the Hamberg yard of the Southern Railway Company.

To the third interrogatory he answers and says:

I worked in the Hamberg yard as night operator from 11 o'clock P. M. on the night of August 25th until 8 o'clock A. M. on the morning of 26th. When I went to work the yard was entirely free form water and I had no reason to anticipate that the water would get into said yard. I received no communications during the night forecasting the height to which the water would rise and the extent of the flood came as a complete surprise to me. When I left work the water had risen to a height of about two feet in front of the office and as far as I could see covered the tracks in the yard generally. I did not go back to the yard until August 27th about 3 o'clock. At that time the water was receding, but I had to use a boat to get to the office. The river was a great deal higher at that time than I have ever seen it.

To the fourth interrogatory he answers and says:

I have only been living in Augusta regularly for about 5 years and I cannot state how the flood of 1908 compared with previous floods.

To the fifth interrogatory he answers and says:

I saw engineer Dent start with an engine and crew to try and get the cars out of the yard to a place of safety. This was about 8 o'clock or a little later on the morning of August 26th. The effort to get at the cars was unsuccessful due to a floating trestle.

To the sixth interrogatory he answers and says:

Referring to the blue print attached to the testimony of H. L. Hungerford the cars which were destroyed were standing upon one of the tracks designated upon said blue print as tracks Nos. 1, 2, 3, 4 and 5 in the Old Hamberg yard. I am not certain which one of these tracks the cars were on.

To the seventh interrogatory he answers and says:

I know of nothing further to state.

Cross-interrogatory:

To the first cross-interrogatory he answers and says:

I cannot give the data or information asked for in this question.

(Signed) M. J. MARCUS.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public & Commissioner. [SEAL.]

46 *Answers of H. L. Hungerford.*

UNITED STATES OF AMERICA:
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public, commissioner, etc., did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock H. L. Hungerford, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound to him the said interrogatories and cross-interrogatories, to which he made answers as follows, to-wit:

To the first interrogatory he answers and says:

H. L. Hungerford, age 42, occupation superintendent Charleston Division Southern Railway, headquarters Charleston, S. C.

To the second interrogatory he answers and says:

I left Charleston 5 P. M. August 24th en route to Rock Hill, S. C. reaching Rock Hill about 10:30 August 24th. I was in Rock Hill August 25th until about 3 P. M. when I left Rock Hill on the work train en route to Kershaw, S. C. I spent the night of August 25th at Kershaw. On August the 26th I was between Kershaw and Camden, S. C. on a work train, reaching Cam-
47 den midnight of August 26th. On August 27th I was between Camden, S. C. and Boykin S. C. on a work train.

To the third interrogatory he answers and says:

I only know of the condition of the yard at Hamberg and the Savannah River at the time in question from reports which were telegraphed to me by the yard master of Hamberg yard. On August 25th the yard was in good condition, the stage of the Savannah river was reported at 22.3 feet on the gauge at Augusta, and a report was issued from the weather bureau that the Savannah River would probably rise to a stage of 33 feet at Augusta, which according to

previous records, would not do any damage to tracks or cars in Hamberg yard, but during the morning of August 26th the Savannah River rose rapidly and went far higher than expected. The rapid rise being unprecedented and unlooked for. By noon of August 26th the river had reached the stage of 36 feet, continuing to rise and reaching a stage of 38.8 feet about 2 A. M. August 27th.

To the fourth interrogatory he answers and says:

The flood of August, 1908 was the highest ever known and the most destructive, being 4 feet higher than the flood of March, 1902, 3½ feet higher than the flood of March, 1891.

To the fifth interrogatory he answers and says:

As I was not in Augusta I can not state from direct knowledge what was done. I can only state from hear say.

To the sixth interrogatory he answers and says:

I have such a blue print, which indicates the location which I herewith hand to the commissioner to be identified by him and attached to my answers. The cars were standing on tracks in old Hamberg yard as indicated on the blue print. I give this testimony from personal knowledge as I visited the scene after the
48 flood and saw the car trucks, where the cars had been destroyed by fire.

To the seventh interrogatory he answers and says:

I visited the Hamberg yard after the flood and the yard master T. J. Hayhoe, pointed out to me the trestle where track leads into Hamberg yard that was undermined and floated by the sudden rush of the water, which prevented him from getting in the old Hamberg yard with a switch engine to pull out the cars on the morning of August 26th.

Cross-interrogatories:

To the first cross interrogatory he answers and says:

I quote from the official report issued by the United States Weather bureau, Augusta, Ga.

"The excessive rain falls that occurred in the North eastern portion of the state from the 24th to the 26th caused great damage by floods. The rivers reached heights hitherto unknown and the destruction to life and property was very great. The rapidity with which the water rose prevented precautionary measures that would otherwise have been adopted, and thus added to the damage that resulted from the flood.

The flood of August 26th-27th, was by far the most destructive in the history of this section, the river reaching a height about *in* inch greater than at the memorable freshet of Sept. 11, 1888.

On August 24th, the river gauge at Augusta registered at that time a height of 11.9 feet. On the morning of the 25th the river had risen to 22.3 feet and reports indicated the following heavy rain falls for the preceding 24 hours: Anderson, 5.50 inches; Calhoun Falls, 3.65 inches; Washington, Ga., 1.28 inches; Greenwood, 1.94 inches. A flood warning was then issued forecasting
49 a stage of 33 feet at Augusta within the next 24 hours. This warning was disseminated widely among the farmers in the

low lands below the city. At 10:30 A. M. the next day the gauge registered 34.4 feet, and the river was rising at the rate of 0.7 ft. per hour. A supplemental warning was then issued placing the maximum stage of 38 feet by midnight, and the warning stated the entire city would probably be submerged. By noon (26th) the water was rushing through the streets like a mill race. The water continued to rise until about 2 A. M. of the 27th, when the gauge registered 38.8 feet. It remained stationary about three hours and then began to recede slowly, registering a height of 38 feet on the morning of the 28th."

From the records of the Commissioner of Public Works at Augusta, Ga., the following records of previous high waters at Augusta, are taken:

Year.	Date.	Height.	Year.	Date.	Height.
1888.	Sept. 11th.....	38.1½	1891.	March 9th.....	35.5½
1892.	Jan'y 15th.....	29.5	1894.	Oct. 11th.....	27.9
1895.	Jan'y 11th.....	30.6	1896.	July 10th.....	30.3
1897.	Ap'l 6th.....	29.4	1898.	Sept. 3rd.....	28.5
1892.	Feb'y 8th.....	31.0	1900.	Feb'y 14th.....	32.8
1901.	Ap'l 4th.....	21.3	1902.	March 1st.....	34.7

On other years between 1888-1908 the rise was not over 27.0 ft."

(Signed) H. L. HUNGERFORD.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st. day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Commissioner and Notary Public. [SEAL.]

50 *Answers of D. W. Newell.*

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission, issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st. day of January, 1910 at the hour

of 10 o'clock, D. W. Newell, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

D. W. Newell, age 52, train master Charleston Division, Southern Railway.

To the second interrogatory he answers and says:

I was at different points enroute from Marion, North Carolina to Augusta, Ga.

To the third interrogatory he answers and says:

51 I cannot state because I was not present at either Augusta, Ga. or Hamberg, S. C. during the time in question.

To the fourth interrogatory he answers and says:

I cannot give any information on this subject.

To the fifth interrogatory he answers and says:

I do not know.

To the sixth interrogatory he answers and says:

Referring to the blue print attached to the testimony of H. L. Hungerford the cars which were destroyed were standing upon one of the tracks designated as tracks Nos. 1, 2, 3, 4, and 5 in the old Hamberg yard, as shown upon said blue print. I saw the car trucks after the cars had been destroyed by fire. I cannot state positively, however, upon which track the cars were standing.

To the seventh interrogatory he answers and says:

I can state nothing from personal knowledge.

Cross-interrogatory.

To the first cross interrogatory he answers and says:

I cannot give the data or information requested by this interrogatory.

(Signed) D. W. NEWELL.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

52 *Answers of J. R. Anderson.*

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me, on this 5th day of February, 1910, at the hour of Ten o'clock, J. R. Anderson, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and the cross interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

J. R. Anderson, age 37, Superintendent Blue Ridge Railway.

To the second interrogatory he answers and says:

I was in Anderson, South Carolina, and at different points along the Blue Ridge Railroad.

To the third interrogatory he answers and says:

My recollection is that it rained some on nearly each day mentioned. On August 24 I was in Anderson, S. C., and I recall distinctly that it commenced raining hard at about 7 o'clock
53 P. M. and continued in a perfect down-pour until about noon of the following day—the 25th. I think that this rain was the hardest that I have ever seen fall for such a period of time.

To the fourth interrogatory he answers and says:

As a result of the above rain the streams and rivers in that neighborhood were very much swollen, in fact, to an extent greater than I have ever seen them before. Upon the Blue Ridge railroad we had seven or eight wash-outs and one trestle washed away. This trestle spanned a stream called Broadway Creek, was about 75 feet high and about 300 feet long. Rocky River, which traverses a considerable section of the country lying to the East of Anderson, was far out of its banks, and did considerable damage to property along its course. Most of the rain fell in the section traversed by said Rocky River, Broadway Creek, Six-and-Twenty, Three-and-Twenty and Steel Creek-. The waters of all of these streams were higher than I have known them to have been before, and the rise was an exceptionally rapid one.

To the 5th interrogatory he answers and says:

In this connection I will state that the unprecedented floods of water which fell in the territory above described, flowed, by means of the Rocky River, Broadway Creek, and other creeks named, into the Savannah River, and were thence precipitated upon the city of Augusta, Georgia, and Hamburg, South Carolina. All of the waters from the water-shed, just west of Rocky River, flowed directly into the Savannah River, and in August, 1908, great volumes were suddenly and unexpectedly thrown into said rivers by the unusually hard rains which I have mentioned above.

Cross-interrogatories:

54 In answer to 1st cross interrogatory, he answers and says. I cannot give the information asked for because I did not measure the rise by inches by hour, and I have no record of same.

(Signed) J. R. ANDERSON.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office this 5th day of February, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

Answers of J. A. McElroy.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910, at the hour of 10 o'clock, J. A. McElroy, one of the witnesses named in the annexed commission, and, after having first duly
55 sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross-interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

J. A. McElroy, age 53, Farmer and merchant.

To the second interrogatory he answers and says:

I was at Sandy Springs, Anderson County, South Carolina.

To the third interrogatory he answers and says:

It rained intermitten-ly on August 22, 23 and the early part of the 24th. During the night of August 24th, it began to rain very hard and rained in a continual down pour until about 2 o'clock P. M. of the 25th. I suppose this unusual hard rain was what is commonly called a cloud-burst. Looking out of my window on the morning of the 25th, I could not see for a greater distance than about 100 yards. It rained lightly during the afternoon of August 25th but I do not think it rained on the 26th, 27th and 28th. I remember the rain on August 25th especially because it was an election day. I have never seen as hard a rain as the one described on the night of August 24th and the morning of August 25th.

To the fourth interrogatory he answers and says:

Sandy Springs is located upon the water shed of the Savannah River, and the only two creeks in my immediate neighborhood are called Three-and-Twenty and Six-and-Twenty. These two creeks unite and form Deep Creek, which in turn flows into the Senneca River and thence into the Savannah River. Three-and-Twenty and Six-and-Twenty were very much swollen as a result of the rains above referred to and in fact were higher than they had ever been known to be before.

56 To the fifth interrogatory he answers and says:

I know it to be a fact that there were excessive rain falls in the vicinity of Sandy Springs. I also know it to be a fact that all of the creeks, streams and tributaries in that section of the country flow into larger streams or rivers, which in turn empty into the Savannah River. I can also state that rise of the waters in these creeks and streams was a great deal swifter and more unexpected than they have ever been before.

Cross-interrogatory:

a To the first cross-interrogatory he answers and says:

I cannot give the information asked for in this question because we have no measures upon the creeks or streams around Sandy Springs. I have no record of the number of inches that the streams rose per hour.

(Signed) J. D. McELROY.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

Answers of L. E. Campbell.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

57 Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock, L. E. Campbell, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross-interrogatories, I did then propound to him the said interrogatories and cross-interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

L. E. Campbell, age 65, occupation farming.

To the second interrogatory he answers and says:

I was where I now reside in Anderson County at the head waters of Rocky River. My farm is located about six miles from Anderson, S. C.

To the third interrogatory he answers and says:

The weather during that time was very rainy indeed, extremely so. The rain fell especially hard on August 25th, in fact, so incessantly that I could not get out of the house to vote. Not a vote was cast in my precinct on account of the high water.

To the fourth interrogatory he answers and says:

As a result of the rains above described the bridges that cross the creeks in my neighborhood were all washed away. The waters of Rocky River at that point rose from 10 to 12 feet higher
58 than it ever rose before. The high water in August, 1908 exceeded all previous freshets in that vicinity, even the great freshet of 1852, which had established a high water mark until the freshet of 1908. The rise of water was much more rapid in 1908 than I ever known it before. The flood was more extensive and did a great deal more damage than any other previous flood.

To the fifth interrogatory he answers and says:

The waters of the Rocky River and all the other streams in my vicinity being much higher and of greater volume in 1908 than ever before, naturally caused an unprecedented flood at Augusta, Ga.,

because all of the water from Rocky River and the other streams referred to flows in to the Savannah River and after being augmented by the rivers, creeks and streams between the mouth of the Rocky River and the City of Augusta, was forced into narrower channel at Augusta, Ga. This caused a great and unexpected overflow at that point, which I understand is claimed as the cause of the damage to the rice now sued for.

Cross-interrogatory:

To the first interrogatory he answers and says:

I can not give the information requested in this question because I had no means of measuring the number of inches the streams rose per hour.

(Signed) L. E. CAMPBELL.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

59 *Answers of P. C. Martin.*

UNITED STATES OF AMERICA.
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock, P. C. Martin, one of the witnesses in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross-interrogatories, I did then propound to him the said interrogatories and cross-interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

P. C. Martin, age 69, occupation farmer and merchant.

To the second interrogatory he answers and says:
Calhoun Falls, South Carolina.
To the third interrogatory he answers and says:
The weather was very inclement and stormy. The rains were the heaviest that I ever experienced—practically amounted to a cloudburst. The Streets of Calhoun Falls were submerged in water to about waist deep.

60 To the fourth interrogatory he answers and says:
The bridges over the creeks which empty into Rocky River were all washed away. The railroad bridge across the Savannah River just below the mouth of Rocky River was also washed away. The Rocky River rose to a height to which it has never been before, and the rise was a great deal quicker and more sudden than it has ever been before. The whole country about was inundated. An immense island containing over 300 acres of land situated in the Savannah River just below the mouth of Rocky River was almost completely washed away. The flood was the most destructive that was ever known in the history of South Carolina.
To the fifth interrogatory he answers and says:
The waters of Rocky River, which is just above Calhoun Falls, and the Waters of the Great Broad River, which is just below Calhoun Falls, as well as the waters of all the other streams and tributaries of the entire section of country around Calhoun Falls empty into the Savannah River. In August 1908 all of these rivers and streams were suddenly flooded by an unexpected and unprecedented fall of rain, as the result of which they rose to heights greater than they had ever been to before. This immense volume of water was precipitated upon Augusta, Ga. and Hamburg, S. C. practically without warning to the people in that section. I remember the freshet of 1888. That freshet was not caused by excessive rain falls in the vicinity of Calhoun Falls but was caused principally by excessive rain falls lower down the Savannah River in that section of country that is traversed by Steven's Creek. The Rocky River was not nearly so high in 1888 as in 1908. There was a temporary railroad bridge across Rocky River in 1888, which was built about 8 or 10
61 feet above the level of said river. That temporary bridge was not submerged in 1888. In 1908 there was a bigger, better built, higher and stronger permanent bridge across Rocky River, which said bridge was entirely washed away.

Cross-interrogatories:

To the first cross-interrogatory he answers and says:
I can not give the number of inches an hour that the streams rose, because I have never seen a record of the rate the water rose per hour.

(Signed) P. C. MARTIN.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

Answers of P. J. Pfeiffer.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M.
62 Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock, P. J. PFEIFFER, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and crossinterrogatories, I did then propound to him the said interrogatories and cross-interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

P. J. Pfeiffer, age 45, occupation farmer, also United States weather observer situated at Calhoun Falls, S. C. I am also County Constable of the County of Abbeville, South Carolina.

To the second interrogatory he answers and says:

Calhoun Falls, in the County of Abbeville, South Carolina.

To the third interrogatory he answers and says:

On or about August 22 or 23 1908 began to rain at Calhoun Falls, South Carolina. We had about three rainy days. The heaviest rain being on the morning of August 25th. During these three days there was a little over 12 inches of rain fall. The rain fall on the morning of August 25th was the heaviest and the hardest rain that I have ever seen.

To the fourth interrogatory he answers and says:

The streams and rivers around Calhoun Falls all overflowed and were higher than I have seen them in my life. The water also rose more rapidly than I ever seen it. At one time it rose 4 inches in 10 minutes. All the bridges and mill houses on Rocky River were washed away.

63 To the fifth interrogatory he answers and says:

The waters of Rocky River and all the other streams in

the neighborhood of Calhoun Falls entered into the Savannah River, and after being joined by the waters of the creeks between Calhoun Falls and Augusta, Ga., finally flows right between the City of Augusta on the South side and Hamberg, S. C. on the North side. In August 1908 the greatest volume of water that has ever fallen upon the water shed around Calhoun Falls poured into the Savannah River with great suddenness and caused a most unusually rapid rise in the Savannah River. This is the water that caused the freshet at Augusta. I remember that Freshet of 1888. I was living at Calhoun Falls at that time. The Rocky River and the other streams around Calhoun Falls were not very much swollen then, in fact, there has never been such floods of water in the section around Calhoun Falls like there was in August 1908.

Cross-interrogatories:

To the first cross interrogatory he answers and says:
On the morning of August 25th, 1908, the Savannah River was 13 and some tenth- feet, I don't remember the exact height. At 4:30 p. m. on August 25th, the Savannah River had risen to a height of 28.3 feet. That was the highest it reached. I have not got with me a record of the number of inches an hour the river rose but as stated above at one time it rose 4 inches in 10 minutes.

(Signed) P. J. PFEIFFER.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

64 In faith whereof, I have hereunto set my hand and seal of office this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

Answers of Granville Beale.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD Co. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910, at the

hour of 10 o'clock, Granville Beale, one of the witnesses named in the annexed commission, and after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories I did propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

Granville Beale, age 56, I am a farmer and also conduct a real estate business.

To the second interrogatory he answers and says:

I was at Calhoun Falls, S. C.

To the third interrogatory he answers and says:

65 I can not state at this time the exact dates on which it rained, but I distinctly remember that the general weather condition at that time was very rainy.

To the fourth interrogatory he answers and says:

The rains which fell were really torrential. They raised the Savannah River to a height at which I have never seen it before. I had been living at Calhoun Falls for nearly 20 years. Rocky River empties into the Savannah River at Calhoun Falls. Rocky River was a great deal higher on or about August 25th and 26th 1908 than I have ever seen it at any other time. It was far out of its banks and in fact completely washed away the Savannah Valley Railway Bridge which was just above Calhoun Falls. I own an island in the Savannah River just below the mouth of Rocky River. This island comprised about 310 acres of land and its surface was about 10 feet above the level of the Savannah River. The great volume of water which poured out of Rocky River into the Savannah River and united with the already swollen waters of the latter river, washed away about 250 acres of the island above referred to. The rain fall at that time was greater than I have ever known it.

To the fifth interrogatory he answers and says:

I have stated above everything that I think bears upon the subject.

Cross-interrogatory:

To the first cross-interrogatory he answers and says:

I cannot give the information asked for because I have no record of the number of inches per hour that the streams rose.

(Signed) GRANVILLE BEAL.

66 All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

Answers of J. C. Parks.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD Co. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit, by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 5th day of February 1910, at the hour of Ten o'clock, J. C. PARKS, one of the witnesses named in the annexed commission and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross-interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

67 My name is J. C. Parks, age 29, railroad agent and United States river gauger.

To the 2nd interrogatory he answers and says:

I was at Woodlawn, South Carolina.

To the third interrogatory he answers and says:

It rained intermittently for about two days prior to August 24th, and it rained some on August 24th, but it did not rain very hard on any of these days. August 25th was, I think, cloudy but I do not think it rained. While I cannot state positively, I don't think it rained either on August 26, 27 or 28.

To the 4th interrogatory he answers and says:

I live up on a hill about 150 yards from the Savannah River, at a point about 17 miles above Augusta. The Savannah River is the only river in this immediate neighborhood. On the afternoon of August 25th, 1908, the Savannah River at the point referred to, was of an average depth of about six feet at six P. M. At six o'clock A. M. on the morning of August 26th, the river had risen to a height of about between 25 and 30 feet, and was still rising very rapidly. By two o'clock on the same day—the 26th—the river reached a maximum height of forty feet. The river gauge, placed by the Government at this point, only registers a river of a maximum height of 37 feet, but at two o'clock on August 26, 1908, the Savannah River had risen to a height of three feet above said gauge.

I give this testimony from measurements made both by myself and a special government agent, authorized to investigate this fact.

This rise of the Savannah River was by far the most rapid that I have ever known of. This flooded condition of the Savannah River was not caused by the rain fall in our immediate vicinity, for we had comparatively little rain during the period in question. The rain fall that caused the freshet of August 26, 1908, was undoubtedly caused by the sudden and excessive rain fall up and around
68 Calhoun Falls and the foot hills of the Appalachian range.

This rain fall all poured into the Savannah River, through the streams and tributaries of that section of the country. Of course, the further down the Savannah River, toward Augusta, the river proceeded, the worse the flood became, because the floods of water from the upper country was joined by the numerous streams and creeks between there and Augusta.

To the 5th interrogatory he answers and says:

I do not believe that the flood of August 26th, 1908, could have been anticipated. It came as a sudden and unexpected deluge from the country higher up the river, without any warning whatever.

Cross-interrogatories:

In answer to the first cross interrogatory he answers and says:

I cannot answer this question. I have given above all the information which I have, bearing upon it.

(Signed) J. C. PARKS.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office this the 5th day of February, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

69 *Answers of W. R. Parks.*

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTH EASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910, at the

hour of 10 o'clock, W. R. Parks, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

W. R. Parks, age 60, planter by occupation.

To the second interrogatory he answers and says:

I was in or about Parksville, South Carolina.

To the third interrogatory he answers and says:

I cannot state of my own recollection whether or not it rained on August 22, 23 and 24, 1908. On August 25th, 1908 I attended an election at Modoc, S. C., which is about 4 miles from Parksville, and I remember that it rained practically all that day. I don't think it rained on the 26, 27 and 28 of August, 1908. I am also
70 positive that it did not rain much if any on the 22, 23 or 24, because if there had been much rain on those days I would have remembered it.

To the fourth interrogatory he answers and says:

My recollection is that we only had one very rainy day in my locality, namely August 25th. The result of that day's rain was to cause a slight rise at Steven's Creek, which is just about a mile and a half East of Parksville, but the rise was not at all a serious one. I operate a mill upon Steven's Creek and at no time was the water too high for me to grind at said mill. The reason why I remember so positively that we did not have any excessive rain fall at the time mentioned is that I felt no anxiety on account of the mill just referred to. The Savannah River runs just two miles West of Parksville. On August 26th, I went over to the Savannah River at the point nearest Parksville and I found said river much higher than I had ever seen it before. The river was out of its banks and up into the trees. I remember well the Freshet of 1888 and the Savannah River at the point to which I refer was much higher in August 1908 than it was in 1888. To the best of my knowledge and belief I believe that the Savannah River was six feet higher near Parksville, S. C. in August 1908, than it was during the freshet of 1888. This fact can only be accounted for in one way, to-wit: the freshet of 1888 was caused from the tributaries flowing into Steven's Creek in S. C. and Little River, In Georgia, and thence into the Savannah River, while the freshet of 1908 was caused by the waters from Rocky River and other streams and creeks much further up the river. In 1888 the excessive rain fall was in that portion of the State of South Carolina which is traversed by Steven's Creek, and Steven's Creek was a great deal higher in 1888 than in 1908.
71 The waters of Steven's Creek reach the Savannah River just above the Locks at Augusta, but in 1908 the excessive rain fall was in that portion of that state which is traversed by Rocky River, the waters of which empty into the Savannah River near Calhoun Falls, thus in 1888 the freshet was caused by excessive rain fall in that section of the country which is near Augusta, and by the waters of the creeks and streams which enter the Savannah River

just above Augusta, but in 1908 the freshet was caused by the descent of waters into the Savannah River from Creeks and streams much higher up the river, that is at a greater distance from Augusta, and of whose swollen condition the general weather conditions around Augusta and vicinity gave no notice.

I attach hereto a rough sketch, which shows the Savannah River and the relative positions of Rocky Creek and Steven's Creek. The memorandum of facts written to the left of this sketch sets forth the truth as to the condition and causes of the floods of 1888 and 1908 respectively. I incorporate this sketch and the memorandum of facts thereon, as a part of my testimony.

To the fifth interrogatory he answers and says:

I know no further facts, bearing upon this subject.

Cross-interrogatory:

To the first cross-interrogatory he answers and says:

I have no record of the number of inches per hour that the streams rose and I have given full particulars above of all that I know upon the subject.

(Signed) W. R. PARKS.

All of which above answers were reduced by me to writing
72 in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st. day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

73 *Rough Sketch and Memorandum of Facts by W. R. Parks Attached to Foregoing Answers of W. R. Parks.*

(Here follows diagram marked page 73.)

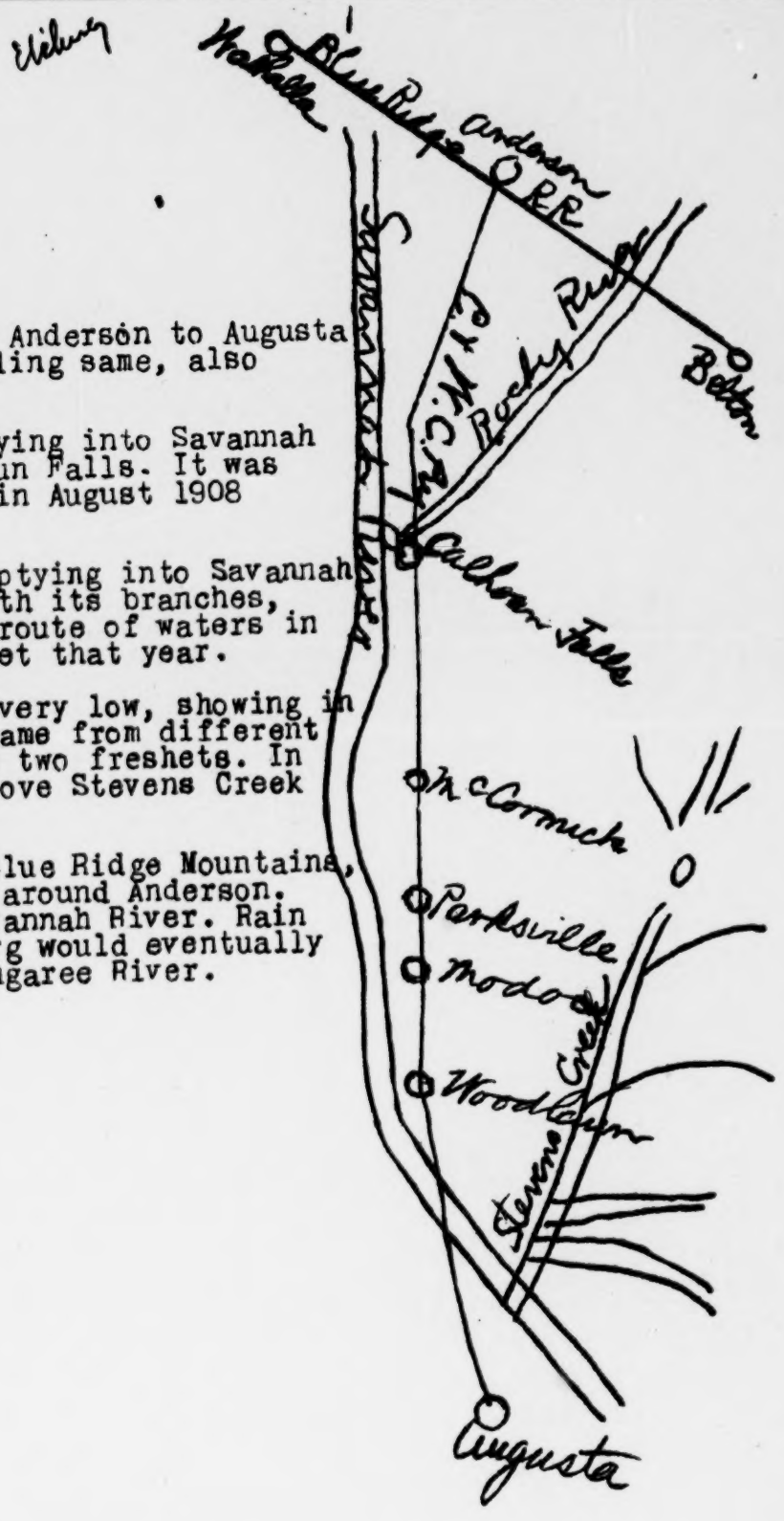
Sketch showing C&WC Ry Anderson to Augusta Savannah River paralleling same, also creeks, branches, etc.

Shows Rocky River emptying into Savannah River just above Calhoun Falls. It was waters of Rocky Creek in August 1908 that caused freshet.

Shows Stevens Creek emptying into Savannah River near Augusta, with its branches, tributaries. This was route of waters in 1888 that caused freshet that year.

In 1908 Stevens Creek very low, showing in 1888 and 1908 waters came from different sources and caused the two freshets. In 1888 Savannah River above Stevens Creek rather low.

Little or no rain in Blue Ridge Mountains, all rain falling from around Anderson. section empties in Savannah River. Rain from around Spartanburg would eventually reach Columbia and Congaree River.



74 *Answers of W. F. Taylor.*

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond County:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 5th day of February, 1910, at the hour of ten o'clock, W. F. Taylor, one of the witnesses named in the annexed commission, and after having first duly sworn him according to law, to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

My name is W. F. Taylor, age 52. I am a United States mail delivery clerk.

To the 2nd. interrogatory he answers and says:

I was living about three miles from Woodlawn, S. C., and carrying mail on the R. F. D. route to Woodlawn.

To the 3rd. interrogatory he answers and says:

The weather was fairly cloudy and rainy, but without any excessive rains. It rained hard for a little while on August 25th., but not long.

To the 4th interrogatory he answers and says:

75 I live right between Stevens Creek and the Savannah River. Stevens Creek was very little affected by the rain fall, but the Savannah River was a raging torrent and much higher than I have ever seen it. I think, however, that the flood in the Savannah River was caused by rain fall higher up the country.

To the 5th. interrogatory he answers and says:

I remember the flood of 1888; that flood was caused by the excessive rain fall in the vicinity of Stevens Creek, and the country lying between Stevens Creek and Augusta, Georgia. At that time the general weather conditions upon the lower end of the river were such as to put the people on notice to expect very high water. In 1908, the flood descended upon us suddenly, unexpectedly and without warning, from higher up the country. The weather conditions, upon the lower part of the river in 1908, were not such as to give warning of the flood that followed. I will also state that the rise of the Savannah River in 1908, was much more rapid than it was in 1888.

Cross-interrogatory:

To the first cross-interrogatory he answers and says:
I cannot tell the number of inches per hour the river rose. I only went there at different times, and observed its height generally. I know, however, that it rose very fast.

(Signed) W. F. TAYLOR.

All of which above answers were reduced by me to writing in his presence and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this the 5th day of February, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

76 *Answers of J. R. Blackwell.*

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock, J. R. Blackwell, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:
J. R. Blackwell, age 62, Magistrate of Fifth District of Edgefield County, South Carolina.

To the second interrogatory he answers and says:
I was in or about Parksville, S. C.

To the third interrogatory he answers and says:
I don't remember the condition of the weather except on August 25th. On that day I was at Modoc for primary election, and I remember that it rained that day.

To the fourth interrogatory he answers and says:

77 The streams and creeks around Parksville and vicinity were not very high but the Savannah River, about two miles

West of Parksville, was higher than I have ever seen it. I remember the freshet of 1888. In August 1908 the Savannah River was several feet higher near Parksville S. C. than it was in 1888, but in 1888 Stevens Creek was nearly thirty feet higher than it was in August, 1908.

To the fifth interrogatory he answers and says:

I have carefully examined the sketch attached to the interrogatories of W. R. Parks and have carefully read the statement of facts written thereon. The sketch referred to is marked Exhibit B. This sketch correctly represents the Savannah River and the relative positions of Rocky River and Stevens Creek, and the facts written to the left of said sketch are true.

Cross-interrogatory:

I have no record of the number of inches per hour that the streams rose. I have already stated fully everything that I know relating to this subject.

(Signed) J. R. BLACKWELL.

All of which above answers were reduced by me to writing in his presence and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

78 *Answers of C. W. Sykes.*

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock, C. W. Sykes, one of the witnessse named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

C. W. Sykes, age 21, occupation yard conductor Southern Railway Co.

To the second interrogatory he answers and says:

I was working for Southern Railway Company at Augusta, Ga. and part of the time in Hamberg, S. C.

To the third interrogatory he answers and says:

On the night of August 25th, 1908 I was working as yard clerk for the Southern Railway Co. at its yard in Hamberg, S. C. At 1 o'clock A. M. on the morning of August 26th. I received car A. G. S. No. 12406 and car C. N. O. No. 15545 from the Georgia Railroad.

79 I am testifying to this fact after refreshing my memory from an original record made by me at the time that I received the above cars. This record is contained in a book belonging to Southern Railway Co. and cannot be parted with by me. I had the two cars referred to placed in a train of cars which was being made up for Charleston, S. C.

To the fourth interrogatory he answers and says:

I have lived in Augusta all of my life and in August 1908 I had been working for the Southern Railway Company for 5 years. I had never seen the Savannah River anywhere near as high as it was in August, 1908. The rise at that time was very rapid and unexpected. I knocked off work at 6 A. M. on the morning of August 26th. I went home and got breakfast and came back to the office about 7:30 o'clock A. M. I worked around the office until about 11 o'clock A. M. and then had to wade through water almost neck deep in order to get home.

(Signed) C. W. SYKES.

All of which above answers were reduced by me to writing in his presence, and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office this 31st day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

Answers of J. R. Southall.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

80 Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered suit by the

Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock, J. R. Southall, one of the witnesses named in the annexed commission, and, after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, — to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

J. R. Southall, age 32, occupation car inspector for Southern Railway Company of Augusta, Ga.

To the second interrogatory he answers and says:

At Augusta, Ga. and part of the time in Hamberg, S. C.

To the third interrogatory he answers and says:

The cars referred to were received from the Georgia Railroad on August 25th. 1908. I give this testimony by reference to original records which are contained in a book belonging to Southern Railway Company and cannot be parted with by me. Several days after the freshet of August, 1908 I examined a train of car trucks which were standing upon track No. 5 in the old Hamberg yard of the Southern Railway Co. The bodies of these cars had burned down almost to the floors but by an examination of the trucks and sills I could tell the number and initial of each car. Among these cars
81 was A. G. S. No. 12406 and C. N. O. No. 15545. There were two cars in this train of cars which contained quick lime and they both had the appearance of having been burned by fire caused by the ignition of said lime through contact with water. The lime was wet and scorched and I give as my opinion that it caused the fire that resulted in the destruction of this train of cars.

To the fourth interrogatory he answers and says:

I have lived in Augusta, Ga. for 15 years and I have never seen the Savannah River any where near as high as it was in August, 1908. The rise came very suddenly and unexpectedly and engulfed the City of Augusta and the Southern Railway yard in Hamberg, S. C.

No cross-interrogatory.

(Signed) J. R. SOUTHALL.

All of which above answers were reduced by me to writing in his presence and were then read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st. day of January, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

Answers of C. J. Blount.

UNITED STATES OF AMERICA,
State of Georgia, County of Richmond:

Civil District Court, Division —.

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD CO. et al.

Be it known, That, acting under and by virtue of the annexed commission issued in the above entitled and numbered
82 suit by the Civil District Court, and authority in me vested, I, James M. Hull, Jr., a Notary Public and Commissioner, did cause to personally come and appear before me on this 31st day of January, 1910 at the hour of 10 o'clock, C. J. Blount, one of the witnesses named in the annexed commission, and after having first duly sworn him according to law to tell the whole truth and to truthfully answer the annexed interrogatories and cross interrogatories, I did then propound to him the said interrogatories and cross interrogatories, to which he made answer as follows, to-wit:

To the first interrogatory he answers and says:

C. J. Blount, age 40, occupation chief inspector for Southern Railway, at Augusta, Ga.

To the second interrogatory he answers and says:

I was working for the Southern Railway Company at Augusta, Ga., and part of the time in Hamberg, South Carolina.

To the third interrogatory he answers and says:

All I know of my own personal knowledge is that I examined a string or train of car trucks, which were standing on track No. 5 in the old Hamberg yard of the Southern Railway Company several days after the freshet of August, 1908. The bodies of these cars had been destroyed by fire on the 26th and 27th of August, 1908. Among the cars so destroyed, but the trucks of which I examined, were car A. G. S. No. 12406 and car C. N. O. No. 15545. One of the cars in this string of cars, to-wit: L. & — 93299, was loaded with quick lime and when I examined it, it looked as though this lime had been ignited by contact with the water which rose several inches in the car. There was also another car in said train of cars,
to-wit: Southern No. 12114, which was loaded with bricks
83 and lime and the lime which remained on the floor of said car gave the same appearance of having been ignited by contact with the water.

To the fourth interrogatory he answers and says:

I have been living in Augusta, Ga., for 40 years and I have never seen the Savannah River anywhere near as high as it was in August, 1908, except in the freshet of 1888. I understand, however, that the freshet of 1908 was several inches higher than the freshet of

1888, as shown by the official records. I have never known the waters of the Savannah River to rise as rapidly as they did in August 1908, and in this respect I consider the freshet in August 1908 as unprecedented.

No cross interrogatory.

(Signed) C. J. BLOUNT.

All of which above answers were reduced by me to writing in his presence, and were read over to said witness, who persisted therein, and were then signed by said witness in my presence.

In faith whereof, I have hereunto set my hand and seal of office, this 31st day of January, 1908.

(Signed) JAMES M. HULL, JR.,
Notary Public and Commissioner. [SEAL.]

Affidavit of S. N. Norris, Offered in Evidence by Counsel for Defendants.

Filed October 27th, 1910.

STATE OF GEORGIA,
Richmond County:

Before me, James M. Hull, Jr., an officer in and for said
84 State and County, duly authorized by law to administer oaths, personally appeared S. N. Norris, who being duly sworn deposes and says that during the month of August 1908 he was employed as yard conductor by the Southern Railway Company at Augusta, Georgia, and his duties consisted chiefly in receiving shipments from industrial plants at and about Augusta, transferring them to the general freight yards of the Southern Railway Company at Hamburg, South Carolina (which is just across the Savannah River from Augusta, Georgia; said shipment being there placed into trains of cars to be transported to their respective destinations. That by reference to his original record, made in his own handwriting, deponent states that he received car L. & N. 93299 at 5:25 P. M. on the afternoon of August 24, 1908 from A. H. McDaniel's warehouse in North Augusta, South Carolina, and transferred it to the general freight yard of the Southern Railway Company at Hamburg, South Carolina.

Deponent was informed by Mr. A. H. McDaniel, or his agent in charge that this car was loaded with lime. Deponent knows nothing as to when billing instructions were given to Southern Railway Company to cover the above shipment.

(Signed) S. N. NORRIS.

Sworn to and subscribed before me this 14th day of March, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public, Richmond County, Georgia. [SEAL.]

85 *Affidavit of Hugh O'Neall; Offered in Evidence by Counsel for Defendants.*

Filed October 27th, 1910.

16076.

STATE OF GEORGIA,
Richmond County:

Before me, James M. Hull, Jr., an officer in and for said State and County, duly authorized by law to administer oaths personally appeared Hugh O'Neall, who being duly sworn deposes and says that he is Chief Clerk to W. J. Townsend, Agent of the Southern Railway Company at Augusta, Ga., and that he occupied this same position during the month of August, 1908. That during a part of the month of August, 1908, including the days of August 24th, 25th, and 26th, he was acting as Agent of the Southern Railway Company at Augusta, and was in charge of the Agency here, owing to the absence of Mr. Townsend from the city. That on the afternoon of August 25th, 1908, at about 5 o'clock he authorized the acceptance over the telephone of shipping instructions from A. H. McDaniel, to cover car L. & N. 93299, loaded with lime, said shipping instructions being that said shipment should be consigned to G. W. Greene at Williston, S. C. Deponent avers that no shipping instructions were received to cover this shipment prior to the ones referred to in the preceding sentence.

In explanation of the variance between the time of receiving the above shipment (as shown by the affidavit of S. N. Norris, attached) and the time of receiving shipping instructions to cover same, deponent says that it was customary and usual for such shipments to be delivered to the Conductor and crew which visited the indus-
86 trial plants in North Augusta, usually in the afternoon, for the purpose of receiving such shipments, and then the shipping instructions to govern same would be sent to the office of the Southern Railway Company at Augusta on the following day. This practice was generally followed by A. H. McDaniel, and deponent avers that although car L. & N. 93299, loaded with lime, was actually received on August 24th, 1908, yet, nevertheless, the way bill to cover movement of same was not delivered to the Yard Master at Hamburg, S. C., until very late in the afternoon of August 25th, 1908, nor could it have been sooner delivered to him because of the absence of instruction from the shippers prior to that time.

(Signed) HUGH O'NEALL.

Sworn to and subscribed before me this 15th day of March, 1910.

(Signed) JAMES M. HULL, JR.,
Notary Public, Richmond County, Georgia. [SEAL.]

Judgment.

Rendered November 15th, 1910.

No. 89927.

NATIONAL RICE MILLING CO.
vs.
N. O. & NORTHEASTERN R. R. CO. et al.

The law and evidence being in favor of plaintiff, for the reasons this day orally assigned by the Court:

It is ordered, adjudged and decreed that there be judgment in favor of plaintiff, National Rice Milling Company, and against defendants, the New Orleans and Northeastern Railroad Company, and the Southern Railway, jointly, and in solido, in the full
87 sum of Two Thousand three hundred and twenty-six and 50/100 Dollars ($2,326.50), with legal interest from judicial demand, until paid, and costs.

Judgment read and rendered in open Court, November 15, 1910.

Judgment signed in open Court November 21st, 1910.

(Signed) GEO. H. THEARD, *Judge.*

Motion for a Suspensive Appeal.

Filed November 28th, 1910, and Entered on Minutes Same Date.

Civil District Court, Division "E."

No. 89927.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. CO. et al.

On motion of Hall, Monroe & Lemann, of counsel for the New Orleans and Northeastern R. R. Co. and the Southern Railway Company and on suggesting that a final judgment was rendered herein against both of these defendants in solido, on the 15th of November, 1910, said judgment having been signed on the 21st day of November, 1910;

That movers are advised that there is error in said judgment to their prejudice and that they desire to appeal therefrom suspensively;

It is ordered that, upon compliance with the requirements of law, they be granted a suspensive appeal from the said judgment returnable to the Supreme Court of Louisiana on the 20th day of December, 1910.

N. O., Nov. 28, 1910.

(Signed) G. H. T.

88 *Appeal Bond.*

Filed November 28th, 1910.

Know all men by these presents That, we New Orleans & Northeastern Railroad Company and Southern Railway Company, in solido, as principals and United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Thomas Connell, Clerk of the Civil District Court, for the Parish of Orleans, his successors, executors, administrators and assigns, in the sum of Four thousand Dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators, firmly by these presents, sealed with our seal, and dated in the City of New Orleans on this 28th day of November, in the year of our Lord one thousand nine hundred and ten.

Whereas, the above bounden N. O. & Northeastern R. R. Co. and Southern Railroad Company have this day filed a motion of appeal from a final judgment rendered against them in the suit of National Rice Milling Company vs. N. O. & Northeastern R. R. Co. & Southern Ry. Co., No. 89,927 of the Civil District Court for the Parish of Orleans, On the 15th day of November, 1910, and signed on the 21st day of November, 1910.

Now the condition of the above obligation is such, That the above bound N. O. & Northeastern R. R. Co. & Southern Ry. Co., shall prosecute this their appeal, and shall satisfy whatever judgment may be rendered against them or either of them or that the same shall be satisfied by the proceeds of their estate real or personal, if they be cast in the appeal; otherwise that the said surety shall be liable in their place.

89 (Signed) NEW ORLEANS & NORTHEASTERN R. R. CO.,
By HALL, MONROE & LEMANN, *Att'ys.*
SOUTHERN RAILWAY CO.,
By HALL, MONROE & LEMANN, *Att'ys.*
THE UNITED STATES FIDELITY & GUARANTY CO.,
Per W. S. SMITH, *Att'y-in-Fact.*
J. ZACH SPEARING, *Att'y.* [SEAL.]

Signed, sealed and delivered in the presence of

——— ———.

——— ———.

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

I, L. W. Gunther, D'y Clerk of the Civil District Court for the Parish of Orleans, do hereby certify that the foregoing seventy-

eight (78) pages do contain a true, correct and complete transcript of all the proceedings had, documents filed and evidence adduced upon the trial of the cause wherein National Rice Milling Co., is plaintiff, and New Orleans & North Eastern R. R. Co. et als., are defendants, instituted in this Court and now in the records thereof under the No. 89927 of the Docket thereof, Division "E," the Honorable George H. Theard, Judge.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said Court, at the City of New Orleans, on this 13th day of December, in the year of our Lord, one thousand nine hundred and ten, and in the one hundred and thirty-fifth year of the Independence of the United States of America.

(Signed) L. W. GUNTHER,
[SEAL.] *D'y Clerk.*

90 *Proceedings Had in the Supreme Court of Louisiana.*

Transcript of Appeal Filed.

No. 18579.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS AND NORTHEASTERN R. R. CO. AND SOUTHERN RAILWAY.

Filed December 15th, 1910.
(Signed) PAUL E. MORTIMER, *Clerk.*

Cause Continued.

(*Extract from Minutes.*)

NEW ORLEANS, *Wednesday, April* 26, 1911.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Provosty, Alfred D. Land and Walter B. Sommerville, Associate Justices.

No. 18579.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS AND NORTHEASTERN R. R. CO. AND SOUTHERN RAILWAY.

This cause was ordered by the Court to be continued with preference.

Cause Called and Continued.

(*Extract from Minutes.*)

NEW ORLEANS, *Thursday, October* 5, 1911.

91 The Court was duly opened, pursuant to adjournment.
Present: Their Honors Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Provosty and Alfred D. Land, Associate Justices.

Absent: Walter B. Sommerville, Associate Justice.

No. 18579.

NATIONAL RICE MILLING CO.
VS.
NEW ORLEANS & NORTHEASTERN R. R. CO. AND SOUTHERN RAILWAY.

This cause came on this day to be heard, but was ordered by the court to be continued upon the suggestion of counsel for both parties.

Cause Called, Argued & Submitted.

(*Extract from Minutes.*)

NEW ORLEANS, *January 4th,* 1912.

The Court was duly opened, pursuant to adjournment.
Present: Their Honors Joseph A. Breaux, Chief Justice, and Frank A. Monroe and Alfred D. Land, Associate Justices.
Absent: Olivier O. Provosty and Walter B. Sommerville, Associate Justices.

No. 18579.

NATIONAL RICE MILLING CO.
VS.
NEW ORLEANS & NORTHEASTERN R. R. CO. AND SOUTHERN RAILWAY CO.

This cause came on this day to be heard and was argued by counsel: Mr. W. C. Jones opened for the plaintiff, appellee; Mr. J. B. Monroe replied for the defendant, appellant; and Mr. Gustave Lemle for the plaintiff, appellee, closed the argument. The court then took the cause under advisement upon the briefs and papers on file.

92 Reargument Ordered by the Court.

(*Extract from Minutes.*)

NEW ORLEANS, *Friday, January 19th*, 1912.

The Court was duly opened, pursuant to adjournment.
Present: Their Honors Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Provosty and Alfred D. Land, Associate Justices.
Absent: Walter B. Sommerville, Associate Justice.

No. 18579.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN R. R. CO. AND SOUTHERN RAILWAY CO.

Order.

The above entitled case is ordered by the court to be reinstated on the docket of the Court for further argument.

Cause Called, Argued & Submitted.

(*Extract from Minutes.*)

NEW ORLEANS, *Tuesday, February 27th*, 1912.

The Court was duly opened, pursuant to adjournment.
Present: Their Honors Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Probosty and Alfred D. Land, Associate Justices.
Absent: Walter B. Sommerville, Associate Justice.

No. 18579.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN R. R. CO. AND SOUTHERN RAILWAY.

This cause came on this day to be heard on the reargument ordered, and was argued by counsel: Mr. Gustave Lemle
93 opened for the plaintiff, appellee; Mr. J. Blanc Monroe replied for the defendant, appellant; and Mr. W. C. Jones, for the plaintiff, closed the argument. The court then took the cause under advisement upon the papers on file.

Final Judgment.

(*Extract from Minutes.*)

NEW ORLEANS, *Monday, April 22nd*, 1912.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Provosty, Alfred D. Land and Walter B. Sommerville, Associate Justices.

His Honor, Mr. Justice Monroe, pronounced the opinion and judgment of the court in the following case:

No. 18579.

NATIONAL RICE MILLING CO.
VS.
NEW ORLEANS & NORTHEASTERN R. R. CO. AND SOUTHERN RAILWAY CO.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that there now be judgment in favor of defendants, rejecting plaintiff's demand and dismissing this suit at its cost.

For written reasons to be handed down, His Honor, the Chief Justice, dissents.

94 *Opinion of the Court.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

NEW ORLEANS, *Monday, April* 22, 1912.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors Joseph A. Breaux, Chief Justice; Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Walter B. Sommerville, Associate Justices.

His Honor, Mr. Justice Monroe, pronounced the opinion and judgment of the Court in the following Case:

95 Mr. Justice Monroe.

MONDAY, *April 22nd*, 1912.

No. 18579.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. and SOUTHERN RAILWAY.

Appeal from the Civil District Court, Parish of Orleans, Theard, Judge.

Statement of the Case.

Plaintiff alleges that the defendants named in the caption are indebted to it, in solido, in the sum of $2,487.50, being the value of two car loads of rice, shipped from New Orleans on Aug. 21 and 22, 1908, consigned to Charleston, South Carolina, and destroyed, on or about Aug. 26, at Hamberg, S. C., while in possession of the second named company,—the allegations being, that "the destruction of said rice was due solely to the negligence, fault and want of care of the said Southern Railway, its agents and employés." The suit is brought on the bills of lading, which are made part of the petition, and which provide, among other things, that the initial carrier, by which they were issued, shall not be liable for losses occurring beyond the limits of its own lines. Plaintiff, however, alleges, in that connection, that the act of Congress of June 29, 1906, declares that the initial carrier may be held liable for the safe delivery of property entrusted to it, under contracts for through shipment, any stipulations in the bills of lading, to the contrary notwithstanding. Otherwise than that, the suit is in affirmance of the contracts represented by the bills. The New Orleans and Northeastern R. Co., for answer, denies that the petition discloses a cause of action.

96 The Southern Railway Company admits that it received the cars and alleges that it

"conveyed them safely, to Hamberg, S. C. where there was an extraordinary and unprecedented flood, which could not have been anticipated, and which sudden flood reached a car load of lime, properly placed, and, setting fire to the same, caused the destruction of 25 cars, among which (were the two cars in question; that this happened without any contributory negligence on its part and that said sudden and unprecedented flood, which could not have been anticipated, with the resultant fire, was the approximate cause of the destruction of plaintiff's property * * *. Respondent avers that, under the limitations and exemptions in the bill of lading sued upon, it is not responsible."

One of the Limitations and exemptions thus referred to reads as follows:

"Neither this company nor any of its connecting carriers shall be liable for any damage to, or destruction of, said property, by

"fire, unless such damage or destruction shall result, directly and "exclusively, from their negligence or that of their employés and "unless such negligence shall be, affirmatively, established by the "owner of said property."

Plaintiff called one witness, by whom it was shown that the rice in question was worth $2,326.50. Defendant examined twenty three witnesses, under commissions; and, from their testimony, it appears that the cars containing the rice were received at Augusta, Georgia, on Aug. 25, and, at 1 o'clock on the morning of the 26th, were sent across the Savannah River, to the, old, Hamberg yard of the Southern Railway Co., on the South Carolina side, where a train was made up, for Charleston, in which the two cars, together with a car
97 of lime, were included; that, thereafter, in consequence of a rise in the river, which was not only unprecedented with respect to the volume of water, but, more particularly, with respect to its suddenness and the lack of warning, the Hamberg yard was inundated, to a depth never before known and, the water coming in contact with the lime, started a fire, which, before it could be reached and extinguished, destroyed most of the cars constituting the train, including those containing the rice. The cause which produced the results thus stated is shown to have been a down pour of rain in that region of South Carolina which is traversed by Rocky River and its tributaries, from Anderson down to Calhoun Falls, where that river empties itself into the Savannah. Some of the witnesses speak of this rain fall as a cloud burst, and they say, generally, that it rained harder, that the streams rose higher and more rapidly, and that the destruction was greater, than was ever before known. J. R. Anderson, Superintendent of the Blue Ridge Railway, was at Anderson, and says that it began to rain hard at about 7 o'clock on the evening of Aug. 24, and continued, in a perfect down pour, until about noon of the following day, and further as follows: "I think that this rain was the hardest that I have ever "seen fall for such a period of time. * * * The waters of all "those streams were higher than I have ever known before and the "rise was an exceptionally rapid one * * *; great volumes "(of water) were suddenly and unexpectedly thrown in said "(Savannah) river."

J. A. McElroy, farmer and merchant, at Sandy Springs in Anderson County: "During the night of the 24th, it began to rain very "hard and rained in a continuous down pour until about 2 o'clock "P. M. of the 25th. I suppose this unusually hard rain was what "is commonly called a cloud burst * * *. I have never
98 "seen as hard a rain * * *; (the streams) were higher "than they had ever been known to be before * * *. I "can also state that the rise of the waters in those creeks was a "great deal swifter and more unexpected than they have ever "been before."

L. E. Campbell, farmer in Anderson County, aged 65: "The "rain fell especially hard on August 25th, in fact, so incessantly "that I could not get out of the house to vote. Not a vote was

"cast in my precinct on account of the high water. * * * The "water of Rocky River, at that point, rose 10 to 12 feet higher "than it ever rose before. The high water in August 1908 exceeded "all previous freshets in that vicinity * * *. The rise was "much more rapid than I have ever known it before. The flood "was more extensive and did a great deal more damage than any "other previous flood."

P. C. Martin, farmer and merchant, Calhoun Falls, aged 69:

"The rains were the heaviest I ever experienced; practically "amounting to a cloud burst. * * * The Rocky River rose to "a height to which it has never been before, and the rise was a great "deal quicker and more sudden than it has ever been before. The "whole country about was inundated * * *. The flood was the "most distructive that was ever known in the history of South "Carolina * * *. In August, 1908, all of these rivers were "suddenly flooded by an unexpected and unprecedented fall of rain, "as a result of which they rose to heights greater than had ever "been before. This immense volume of water was precipitated "upon Augusta, Georgia, and Hamberg, South Carolina, practically, "without warning to the people in that section."

P. J. Pfeiffer, farmer, constable, UU. S. Weather Observer, at Calhoun Falls aged 45:

"The rain fall on the morning of August 25th was the
99 "hardest and heaviest rain fall that I have ever seen.
"The streams and rivers * * * were higher than I have "ever seen them in my life. The water rose more rapidly than I "have ever seen. At one time, it rose 4 inches in 10 minutes. "* * * In August, 1908, the greatest volume of water that has "ever fallen upon the water shed around Calhoun Falls poured into "the Savannah River with great suddenness and caused a most un-"usually rapid rise in the Savannah River."

Granville Beale, farmer and dealer in real estate, Calhoun Falls, aged 56:

"The rains which fell were really torrential. They raised the "Savannah River to a height at which I have never seen it be-"fore. * * * I own an island in the Savannah River, just below "the mouth of Rocky River. This island comprised about 310 "acres of land and its surface was about 10 feet *about* the level of "the Savannah River. The great volume of water which poured out "of Rocky River into the Savannah River, and united with the "already swollen waters of the latter river, washed away about 250 "acres of the island above referred to. The rain fall at that time "was greater than I have ever known it."

J. C. Parks, railroad agent and U. S. river gauger, at Woodlawn, about 17 miles above Augusta, testifies that, at 6 o'clock P. M., on August 25th, the average depth of water in the Savannah River, at that point, was about 6 feet; and that, on the morning of the 26th, at 6 o'clock, "the river had risen to a height of 25 or 30 feet and "was still rising very rapidly. By 2 o'clock on the same day,—the "26th—the river reached a maximum height of 40 feet. * * *. "This rise * * * was, by far, the most rapid that I have ever

"known. * * *. I do not believe that the flood of August 26th,
"1908, could have been anticipated. It came, as a sudden
100 "and unexpected deluge, from the country higher up the
"river, without any warning whatever."

W. R. Parks, planter, residing near Parksville, within two miles of the river, testifies that, to the best of his knowledge and belief, the river was 6 feet higher, in that vicinity, than during the freshet of 1888. W. F. Taylor, U. S. mail delivery clerk, residing at Woodlawn, testifies that the conditions were such as to give people notice of the flood, in 1888, but that, in 1908, the flood descended on them, suddenly, unexpectedly and without warning, from higher up the country; and the river rose more rapidly than in 1888.

J. R. Blackwell, magistrate of Edgefield county, testifies to the same effect.

The official report of the Weather Bureau at Augusta contained the following:

"The excessive rain falls that occurred in the northeastern portion "of the State" (meaning the State of Georgia, but referring, also, "as we take it, to the rain falls which occurred in the northwestern "portion of South Carolina)" from the 24th to the 26th, caused "great damage by floods. The rivers reached heights hitherto un-"known, and the destruction of life and property was very great. "The rapidity with which the water rose prevented precautionary "measures that would otherwise have been adopted and thus added "to the damage that resulted from the flood."

The amount of water which thus fell at different points from Calhoun Falls up to the head waters of Rocky River, and which that river emptied into the Savannah, during the day and night of August 25, was appreciated only by those who saw it fall or measured it; and, though the officers of the weather Bureau, at Augusta, published a notice, during the day of the 25th, that the river
101 might be expected to rise to a height of 33 feet, they were 5.8 feet below the mark, as it ultimately went to 38.8 feet. Up to 12, and, possibly, 1 o'clock on the night of the 25th, however, the old Hamberg yard, where the train, of which the rice cars and the lime car formed parts, was standing, was dry, and those cars would have remained dry if the water had not risen above 33 ft.

Hayhoe, the yard master, testifies, that his usual working hours were from 7, in the morning, to 7, at night, but that, on the 25th, he received a message from the Superintendent that the river was expected to rise and he, therefore, stayed at the yard until 12 o'clock, and then went home, leaving the river within its banks. On his return, at 7 o'clock on the morning of the 26th, he found the yard under water and the river rising rapidly. But, even then, he did not know, and had no means of knowing, that a flood, unprecedented in the history of the Savannah River, was upon him, and though he, at once, took measures of precaution which were defeated by the flood, it is doubtful whether he really considered that a loaded freight train, standing on solid ground, and the contents of which were above the highest water that had ever been known, save once, was in danger. That he was not alone in failing to appreciate the extent

of the impending calamity may be gathered from the following excerpt from his testimony, towit:—

"I knew of several instances of loss by the flood that looked as if "people that had lived in Augusta for years did not anticipate, for "the reason "(sic)" that the riverside mills were almost ruined; "the C. & W. C. riverside yard was almost completely wiped out, "and several cars washed down the river; several wholesale houses, "located in the heart of the city,—for instance,—Dicks, were badly "damaged by the flood; Nixon's wholesale house was set on fire by
"lime, though, when the water rose so rapidly, they en-
102 "deavored to move their goods to higher ground, but, on
"account of the rapid rise of the water, they were unable to "do so. The water reached their lime, slacked it, and set fire to the "building and several men drowned trying to escape from the "building."

The measure of precaution to which we have referred was an attempt by the yard master to have an engine haul the train, of which the rice cars formed part, out of the yard and to safer ground.

H. L. Thompson, who acted as conductor of the engine, tells the story of that attempt as follows:

"We did everything that could be done, short of risking human "life. I was working as conductor on switch engine No. 1553. We "report on the Georgia side of the river and take our engine out of "the yards there over to Hamberg. The engineer has to oil up his "engine, and, on the morning in question, we reached the Hamberg "yard at about 7.20, A. M. just ahead of the passenger train, which "was leaving Augusta for Charleston, S. C. Upon reaching the "Hamberg yard, we had to get off of the main line, on a side track, "in order to allow the passenger train to go by. At that time, the "tracks and switches were under water and, in order to get to the "old Hamberg yard, where the freight cars were, we had to change "two switches. This necessitated clearing out the mud and sand "from between the switch rails, and consumed some little time. We, "then, proceeded slowly up towards the old Hamberg yard for the "purpose of pulling out the cars which were there. To get to the "old Hamberg yard and get at the cars there, we had to pass over "three trestles. The first of these trestles was the scale trestle, and, "when we passed over it, it went down about 6 inches, showing that "the trestle had been undermined. When we reached the next "trestle and pushed the tender upon it (we were running with the "tender ahead), this trestle sank about 10 inches, and we were "afraid to proceed any further. We feared that the engine might
"turn over. The engineer, the fireman and myself were, at
103 "this time, all on the top of the tender, ready to jump off if
"the engine turned over. Seeing that we could proceed no "further, the engineer jumped in his cab and stopped the engine. "Then we proceeded back, along the way we had come, and, in passing over the scale trestle, we noticed that it went down further "than when he passed over it, going towards the old Hamberg "yards. By this time, the water was much higher everywhere, and "was running through the ash pan of the engine. I think we got "out in time to avoid being caught by the engine. We next got

"hold of three gravel cars and pushed them on the scale trestle, to "hold it down and keep it from floating away. The other trestles "all washed away. I remained working in the Hamberg yard until "about 11 o'clock, but the water had risen so high and the current "was so swift that we could do nothing to save the freight. We "did not, however, at any time, think that the water would rise "sufficiently high to get into the freight cars. When I left the "Southern Railway yard, I did so in order to go to the assistance "of my wife, mother, sister and child, all of whom were in a house "which was in the flood district, and, when I reached home the water "was within 3 or 4 inches of the floor, and, within an hour, it was "running several inches in the house. I had to move furniture, pro- "visions, etc., to the second story, where we remained until the "flood subsided. In my opinion, nothing could have been done to "save the freight in the cars, because the water rose so rapidly and "suddenly."

The testimony of Dent, the engineer, is to the same effect. H. W. Tyler, car inspector, testifies that, when the fire broke out, in the freight train, he and some others tried to get a "batteau," in order to go there and put it out, but, that telephone communication had been cut off and they had to wait until some one came along, in a "batteau," within calling distance; that they secured the
104 "very first one" that they could get, and that he and three other men went over and put out the fire—thereby saving a car load of sheep. He further testifies, that the current was very swift, and, for that reason and because of the floating wood and timber, the expedition was a dangerous one.

"The water" (he says) "rose about six feet in said yard."

G. A. Benson, formed one of the party referred to in the testimony of Tyler, and corroborates that testimony, adding that they did not get the "batteau" until the morning of August 27th.

M. J. Marcus, testifies, in part as follows:

"I worked in the Hamberg yard, as freight operator, from 11 "o'clock P. M., on the night of August 25th, until 8 o'clock A. M., "on the morning of August 26th. When I went to work, the yard "was entirely free from water and I had no reason to anticipate "that water would get into said yard. I received no communica- "tion during the night, forecasting the height to which the water "would rise, and the extent of the flood came as a complete surprise "to me. When I left work, the water had risen to a height of about "two feet in front of the office, and, as far as I could see, covered the "tracks in the yard generally * * *. I saw engineer Dent start "with an engine and crew and try to get the cars out of the yard "to a place of safety. This was about 8 o'clock, or a little later on "the morning of August 25th. The effort to get at the cars was "unsuccessful—due to a floating trestle."

C. W. Sykes gives the following testimony:

"On the night of August 25th, 1908, I was working as yard clerk "for the Southern Railway Co. at its yard in Hamberg, S. C. At 1 "o'clock A. M., on the morning of August 26th, I received car "A. G. S. No. 12,406 and car C. N. O. No. 15545" (being the cars "containing the rice)" from the Georgia Railroad * * *. I

" had the two cars referred to placed in a train of cars which
105 " was being made up for Charleston, S. C. * * *. I have
" lived in Augusta all of my life, and, in August, 1908, I
" had been working for the Southern Railway Co. for 5 years. I
" had never seen the Savannah river any where near as high as it
" was in August, 1908. The rise at that time was very rapid and
" unexpected. I knocked off work at 6 A. M., on the morning of
" August 26th. I went home and got breakfast and came back to
" the office about 7.30 o'clock A. M. I worked around the office
" until about 11 o'clock A. M. and then had to wade through water
" almost neck deep in order to get home."

C. J. Blount, chief inspector for the Southern Railway Co. has lived in Augusta for 40 years. He says:

"I have never known the waters of the Savannah river to rise as
" rapidly as they did in August 1908, and, in that respect, I consider
" the freshet in August, 1908, as unprecedented."

H. L. Hungerford, Superintendent, Charleston Division, Southern Railway, testifies as follows:

"I only know of the condition of the yard at Hamberg and the
" Savannah River, at the time in question, from reports that were
" telegraphed to me by the yard master of Hamberg yard. On
" August 25th, the yard was in good condition; the stage of the
" Savannah River was reported as 22.3 feet on the gauge at Au-
" gusta, and a report was issued from the Weather Bureau that the
" Savannah River would, probably rise to a stage of 33 feet at
" Augusta, which, according to previous records, would not do any
" damage to tracks or cars in Hamberg yard; but, during the morn-
" ing of August 26th, the Savannah River rose very rapidly and went
" far higher than expected—the rapid rise being unprecedented, and
" unlooked for. By noon of August 26th, the river had reached the
" stage of 36 feet—continuing to rise and reaching a stage of 38.8
" feet at about 2 A. M., August 27."

106 At another place, after repeating the statement that the Weather Bureau had published a warning, on the 25th, of a 33 foot stage of water within the next 24 hours, the witness says:

" At 10.30 A. M., the next day, the gauge registered 34.4 feet and
" the river was rising at the rate of 0.7 feet per hour. A supple-
" mental warning was then issued placing the maximum stage of
" 38 feet, by midnight, and the warning stated that the entire city
" would probably be submerged. By noon, the water was rushing
" through streets like a mill race."

Plaintiff obtained judgment against the defendants, in solido, for $2,326.50, and defendants prosecute the appeal.

Opinion as to the Appeal.

There is a suggestion in the brief of plaintiff's counsel that the appeal be dismissed for want of proper parties—the suggestion being based upon the assumption that there is no order of appeal in favor of defendants.

The motion and order relied on by defendants read as follows:

"On motion of Hall, Monroe & Lemann, of counsel for the New "Orleans and Northeastern Railroad Co. and the Southern Railway "Co., and, on suggesting that a final judgment was rendered herein "against both of these defendants, in solido, on the 15th of Novem- "ber, 1910, the said judgment having been signed on the 21st of "November, 1910; that movers are advised that there is error in "said judgment to their prejudice and that they desire to appeal "therefrom, suspensively. It is ordered that, upon compliance with "the requirements of law, they be granted a suspensive appeal from "the said judgment, returnable to the Supreme Court of Louisiana "on the 20th day of December, 1910."

107 The bond was given by the defendants and contains the recital that the appeal was taken by them, but, the same thing might have been said of the bond in the matter of Voekel vs. Succession of Aurich, 118 La., 525, in which, however, the appeal was dismissed, because, in order to sustain an appeal, there must be an order as well as a bond, and the Court was of opinion that the order, there relied on, could not be construed as an order in favor of any one having an appealable interest. In the case at bar, we are of opinion that the order, though badly expressed, may be construed as an order in favor of the defendants, represented, for the purposes of the application, by their counsel.

Thus; the applicants appear as counsel for the New Orleans and Northeastern Railroad Co., and the Southern Railway Co., "and suggest" that a final judgment has been rendered against both of these defendants * * *; that "movers are advised that there is "error in the said judgment to their prejudice and that they desire "to appeal therefrom. * * *." As there are no other defendants in the case in which the motion was filed than the two companies, there can be no doubt that the words "these defendants," refer to said companies. The movers, therefore, appearing as the counsel of the companies, suggest that a judgment has been rendered against the companies, and, having made that suggestion, they, still as counsel of the companies, represent that they are advised that there is error in said judgment, "to their prejudice and that they desire to appeal therefrom."

The question, then, is, to which antecedents do the pronouns "their" and "they" apply? It had already been stated that the judgment complained of had been rendered against the companies—not against the counsel who were appearing in their behalf—and, notwithstanding the confusing, and, perhaps, ungrammatical, use of the pronouns, their obvious purpose is to designate the parties previously mentioned, in whose behalf the movers appeared,

108 who, alone, were condemned by the judgment, who, alone, were complaining of it and who, alone, were interested in appealing. In the case of Voelkel vs. Succession of Aurich, (supra), the motion and order were so framed that the "movers," alone, expressed themselves aggrieved, by the judgment, alleged to have been rendered against them, from which they, alone, prayed for an appeal. This case falls rather within the rulings made in the cases

of Kraeutler vs. Bank, 12 R., 458, and Ansley vs. Stewart, 123 La., 334, and the appeal is sustained.

On the Merits.

Counsel for plaintiff have furnished the court with the report of a case decided by the Supreme Court of South Carolina wherein the law applicable to the issues herein presented is so clearly and satisfactorily stated that, with an acknowledgment of our indebtedness, we venture to appropriate the statement as follows, to-wit:

"In 1 Thomp. on Neg., Sec. 28, the author says: "In determining "whether the due degree of care has been exercised in any situation, "reference must be made to the facts and surroundings of that "situation, and the question can not be determined by abstract "theorizing or idealizing. The question must be looked at as the "defendant might have looked at it, situated as he was, and sur-"rounded as he was. The jury ought to determine by their fore-"sight and not by their hindsight. Speaking with reference to this "question, it has been quaintly reasoned that the fact that, after "an injury occurs by accident, some man of genius discovers a "superior method of preventing such accidents, does not show negli-"gence in failing to use such method of prevention. Accordingly, "that which never happened before, and which, in its character, is "such that it would not naturally occur to prudent men to guard "against its happening, cannot, when, in the course of years,

"it does happen, furnish good grounds for a charge
109 "of negligence in not foreseeing its possible happening and
"guarding against that remote contingency." In Cornman vs. Eastern Counties R. Co., 4 H. & N. 786, Bramwell, B. said:

"In such case, it is always a question whether the "mischief could "have been reasonably foreseen. Nothing is so easy as to be wise "after the event." In 21 A. & E. Enc. L. (2nd), it is said: "The "mere fact that an injury might have been avoided by the adoption "of certain precautions does not prove that there was fault in fail-"ing to anticipate and provide against it. Nor, is the fact that, "after the occurrence of an accident, it is seen that such accident "might easily have been guarded against conclusive of negligence. "Thus, where the possibility of a particular occurrence is demon-"strated only by its happening, there is no liability in negligence. "But the fact that no such accident as the one complained of had "ever happened before is not, of course, conclusive of the fact that "there was no negligence." In volume 13 of the same work, page "721, it is said: "An extraordinary flood is to be classed among the "acts of God which no human power can prevent or avert. Whether "it will relieve the carrier from liability depends upon whether its "results or natural consequences could, by the exercise of reasonable "foresight and prudence, have been foreseen and guarded against. "If the emergency was one that no human sagacity, guided by any "one of the known principles of human reasoning, could have "anticipated, the carrier will be relieved. If, on the other hand, its "effects might have been foreseen by the exercise of reasonable dili-

"gence and prudence, a failure to do so would be negligence and "subject the carrier to damages, although the original cause was the "act of God." And, on page 722 of the same volume, this rule is
"stated: "If the carrier discovers that goods intrusted to his
110 "care are in peril of injury or destruction by flood, then, it
"becomes his duty to use, actively, and energetically, all the "means at his command, or which it might be expected that one "engaged in such a business would possess, to meet the emergency "and save the property from injury, and any neglect to use the "means stated above, which prudent, skilful men in that business "might ordinarily be expected to use in such an emergency, will "subject the carrier to liability."

"It requires no citation of authority to sustain the proposition "that, after a carrier has discovered, or, by the exercise of reason-"able prudence and diligence, should have discovered, that goods "in his possession are subject to the perils of an unprecedented "flood, or other vis major, it is his duty to exercise reasonable care "and diligence to save them from damage and loss," W. E. Ferguson vs. Southern R. Way Co. (S. C. April Term, 1911).

Applying the principles of law thus stated to the facts of the case before it, the learned Court found that, after the defendant (being the same defendant as in this case) was in a position to know that the flood (being the same flood that we are here considering) had broken all previous high water records, it was still in a position, by the exercise of ordinary diligence and the use of the means at its command, to have saved the plaintiff's goods, and, that, having failed to do so, it was liable for their value. We do not, however, find that a similar condition existed in the case here presented. The negligence attributed to defendants is "articulately propounded" in the brief of plaintiff's counsel and the different charges may be considered in the order thus stated:

1. "They allowed the two cars, one, shipped August 21, and the other, August 22, 24 hours apart, to be in the same train in the Hamberg yard on the night of August 25, without giving any reason for delay of first car."

The petition imputes no negligence on the account thus
111 stated and the record is barren of evidence tending to show that there was any unusual delay in the forwarding of either of the cars.

2. They brought the cars from a safe place in Augusta and placed them in the lowest part of the yard, though the river, which had flooded all the cars in the yard, in 1888, had been rising at the rate of from 5 to 8 inches per hour for 36 hours and the weather report, of August 25, showed rain fall of 5.63 inches at Anderson, 102 miles above Augusta, and 3.65 inches at Calhoun Falls, just below Anderson.

About the only evidence as to the safety of Augusta, that we find in the record, is that which tells of the water running through the streets like a mill race, the destruction of life and property, the wiping out of a riverside railroad yard, and the washing down the river of some freight cars.

On the other hand, according to the oral testimony adduced, and a blue print which purports to show certain features of the Hamberg yard, including the position of the cars that were destroyed, 33 feet of water "would not do any damage to tracks or cars in Hamberg yard," and, up to 10.30 o'clock on the morning of August 26, 33 feet *was* all that was predicted by the Weather Bureau, with the information above referred to, as to the rain fall, in its possession. The blue print shows that though the water attained a height of 38.8 feet, it rose only 9 inches above the floors of the rice cars, so that, between the stage that was predicted and that which was attained, there was a margin of 5.8 feet, in order to consume which, it was necessary that the water should rise higher than it had ever done before, and, order that it should do so before the cars could be moved, it was necessary that it should come down, as it did come, in such volume as was never before known. In other words, it was not only the high stage eventually reached, but, also, the unexpected rapidity with which it was reached, that was unprecedented. And,

112 if the Weather Bureau, with its facilities for collecting information, and its trained experts, who devote themselves to that work, were unable to foresee any danger greater than would result from a 33 feet stage of water, we know of no basis upon which the defendant can be held to have been negligent in not having done so, any more than could the citizens of Augusta, who lost their property and their lives, be so held.

3. The Weather Bureau having issued its warning, of 33 feet water, on the morning of the 25th, defendant was negligent in not foreseeing that its tracks and trestles would, probably, be undermined "on account of the great quantity of lumber in the yards in North Augusta, which lumber was bound to dam up against the trestles and weaken them, if the water ever reached these lumber mills."

The name "North Augusta" does not appear in the transcript, so far as we remember, nor is there anything there about lumber mills. There is testimony to the effect that "logs of wood and timber" and "drift wood" were brought down by the current and piled up against the trestles, but there is also testimony showing that all the bridges above the mouth of Rocky River, as, also, 250 acres of an island, below that point, were washed away, which could hardly have been anticipated from the Bureau warning of August 25, but which may account for the logs, wood and timber against the trestles.

4. They were negligent in putting the car of lime in the train with the rice cars, since it was bound to ignite if the flood proved to be as great as in 1888.

The flood in 1888 was only an inch, or so, lower than that of 1908, but, according to the uncontradicted testimony, the people interested received more timely warning of its rise and approach, and, the warning of a 33 foot stage of water, from an official and authoritative source, was not a warning against such a flood.

113 There is no attempt to show that it is unusual or bad railroading to put cars of lime in trains with other merchandise.

5. They were negligent in not attempting to move the rice cars until 7:30 A. M., or later, on the morning of the 26th.

The telegraph operator had gone on duty at 11 o'clock on the night of the 25th and found the yard "entirely free from water," and, when the yard master left the yard, an hour later, "the river was not out its banks and no indication of any serious rise, more than there had been several rises previous to that date." The Weather Bureau did not issue its supplemental warning until 10.30 A. M., of the 26th, but, in the meanwhile, on the return of the yard master, at 7 o'clock, the steps were taken which are described by the witness, Thompson. Just how high the water was, at that time, does not appear, but it could hardly have suggested any record breaking stage, as it only reached 34.4 feet some three hours and a half later, and the impression that we get is that the greater volume of water came down after 7 o'clock since it is shown to have been rising at the rate of 0.7 feet, an hour, at half past ten, and Sykes, who seems to have experienced no difficulty in getting to the office, at 7, says that, at 11, when he returned home, he was obliged to wade "almost neck deep." Looking backward, it is easy to see, and to say, that many things might have been done on the day and night of the 25th, but, considering the situation as it, then, appeared, to those who were best informed (the officers of the Weather Bureau), the necessity for doing anything except what was done, did not suggest itself. It did not suggest itself to the defendant, for the protection of its own property, or to the people of Augusta, for the protection of their property, or their homes, and we can not say that defendant was negligent in failing to realize the existence of such necessity for the benefit of the plaintiff.

114 6. It is said that defendants were guilty of negligence, in, that the Bureau report, of the 26th, showed 34.4 feet of water, with a prospect of 38 feet; that the distance from the rail to the floor of a box car being only 34 inches, they should have known that the line was only 10 inches from the water and would be in contact with it within 90 minutes, and yet they made no arrangements to extinguish the, inevitable, fire.

As we understand the testimony, the water reached the floor of the car when it reached the stage of 37.9 feet (or 0.9 feet below the maximum), but just when that was, the evidence does not show. There are two or three witnesses who testify that it was impossible to get to the burning cars without a "batteau"; that they had none; and that they availed themselves of the "very first one" that they were able to get. They were there—on the spot; they testify to a matter within their knowledge; there is no effort to impeach them; and not a syllable in the way of contradiction or as showing that some one else might have done what they say they were unable to do. We must, therefore, accept their testimony as true.

7. "They were guilty of the grossest and most unpardonable negligence because they waited 17 hours for some passer-by, to get a boat * * *. During this 17 hour wait the passenger trains on the main line were running and there were boats, presumably, in

both places, as one witness testifies that he rowed all over the yards in September 1888."

The only testimony in the record upon the subject of the boat is that to which we have referred, and that to which the counsel refer. There is nothing about the running of the passenger trains or about places where boats are, "presumably," to be found; nor, does it follow, as we think, that, because a witness had rowed around in a boat in 1888, he found the boat in less than 17 hours, or that he could have found one in 1908 in less time. In a suddenly
115 inundated City, as when ships sink at sea, those who have boats are likely to need them for their own purposes.

8. "They are guilty of negligence because these floods were caused by rains higher up the Savannah River (i. e., about 102 miles) than those that caused the flood of 1888. As they had greater time to make preparations they should have known that this car of unslacked lime endangered the whole situation," etc.

The only testimony upon the point thus suggested is to the effect that the people about Augusta and Hamberg had less notice of the flood of 1908 than of that of 1888, and that testimony, considered in connection with the reasons given, is conclusive of the fact.

It being established, beyond controversy, that the proximate cause of the loss complained of was an unprecedented flood, which, standing alone, is a sufficient defence to this action, we are of opinion that the burden of proof rested upon the plaintiff to show that, the flood, notwithstanding, the loss could have been averted by the exercise by defendants, of reasonable care and skill. Memphis vs. Reeves, 77 U. S., 176; Elam vs. St. Louis etc. R. R., 93 S. W., 851; I. & G. N. R. R. vs. Bergman, 64 S. W., 999. Plaintiff has, however, not attempted to carry that burden, save by the cross-examination of defendants' witnesses, and, for the reasons assigned, we do not think the attempt, as thus made, successful.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that there now be judgment in favor of defendants, rejecting plaintiff's demand and dismissing this suit at its cost.

For written reasons to be handed down, His Honor, The Chief Justice dissents.

116 *Syllabus.*

Where, in an action to recover the value of goods entrusted to a carrier and destroyed in transit, it is shown that the proximate cause of the loss was an unprecedented flood, the burden of proof rests upon the plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise, by the carrier, of reasonable care and skill.

[Endorsed:] 18579. Nat. Rice Milling Co.

117 *Petition for Rehearing.*

Supreme Court, State of Louisiana.

No. 18579.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. and SOUTHERN RAILWAY.

The petition of the National Rice Milling Company, plaintiff and appellee, respectfully represents:

That the opinion and decree rendered in this case on April 22nd, 1912, is erroneous and contrary to the law and the evidence, and injurious to the interest of petitioner, and that a rehearing should be granted for the following reasons:

The gist of the Court's opinion is found in the syllabus, which reads as follows:

"Where, in an action to recover the value of goods entrusted to a carrier and destroyed in transit, it is shown that the proximate cause of the loss was an unprecedented flood, the burden of proof rests upon the plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise, by the carrier, of reasonable care and skill."

This decision is based upon the following cases:

"Memphis v. Reeves, 77 U. S. 176; Elam vs. St. Louis, etc. R. R. 93 S. W., 851; I. & G. N. R. R. v. Gergman, 64 S. W. 999,"

but not a single Louisiana decision is given, though the contract in question was a Louisiana contract, and the forum a Louisiana court, and all the authorities on the conflict of laws hold that Louisiana law should govern. In so holding this Honorable Court has broken a rule founded on justice and common sense, and established by a long series of well reasoned and abled decisions running from the 6 Martin to the 115 La. It has furthermore practically set aside paragraph 3 of Article 1933, and Article 2754 of the Revised Civil Code; and these decisions interpreting these
118 articles.

Article 1933 reads as follows: (Omitting par. 1 and 4 which are not relevant).

"When a breach has been passive only, damages are due from the time that the debtor has been put in default, in the manner directed in this chapter.

The rules contained in this and the preceding articles, however, are subject to the following exceptions and modifications:

"Where, by a fortuitous event or irresistible force, the debtor is hindered from giving or doing what he has contracted to give or do, or is from the same causes compelled to do what the contract, bound

him not to do, no damages can be recovered for the inexecution of the contract.

There are two exceptions to the last rule: First, when the party in default by his contract expressly or impliedly undertakes the risk of the fortuitous event, or of the irresistible force; second, if the fortuitous event or case of force, was preceded by some fault of the debtor, without which the loss would not have happened."

Article 2754 reads as follows:

"Carriers and watermen are liable for the loss or damage of the things entrusted to their care, unless they can prove that such loss or damage has been occasioned by accidental and uncontrollable events."

In Hunt v. Morris, 6 Martin, 676, where goods were destroyed by fire while on a boat, Justice Matthews said:

"The rule, by which the responsibility of carriers for loss or damage is to be ascertained, is found in the part of the code just cited. They are excused by accident, or overpowering force, cas fortuit ou force majeure, wherever the first does not occur by their negligence, and they do not unnecessarily go in the way of the latter.—In other words, if they have used that due diligence in the performance of the contract, which the nature of their situation requires.

This rule gives to the plaintiff the advantage of implied or presumptive evidence of negligence, on the part of the masters and owners, which they are bound to disprove by showing due diligence. How far they have succeeded in this, is to be ascertained by the evidence and circumstances of the case."

In Fisher v. Brig Norvall, 8 New Series, 120, wherein cotton was consumed by fire on the wharf, the court held that the defendant must show due care to excuse themselves from the loss.

In Engster & Co. v. West & Co., 35 La. An. 119, plaintiff had bought for export 50,000 bushels of corn from defendants in Ohio, who contracted to deliver them at the shipside in New Orleans within twenty days. The court said:

119 "The defendants had contracted to ship within twenty days. Having failed to perform their contract, they were liable for its inexecution unless they established legal excuses. To say that they were hindered by a 'fortuitous event or irresistible force is not sufficient, unless it also appears: (1) they had not, expressly or impliedly, undertaken the risk; (2), that the event was preceded by no fault on their part contributing to the loss. * * *"

In Maxwell & Putnam v. Railroad Co. 48 La. Ann., 397 where cotton was destroyed by fire while in the custody of the Railroad Company, the court said:

"The force and effect of the law, as modified by the contract, is fully alleged on the one hand and admitted on the other. The loss and resulting damage being admitted, the defendant carries the burden of proving that the loss was 'not due to the company's negligence,' nor to any omission of duty, 'in any manner causing or contributing thereto."

In Lehman, Stern & Co. vs. Southern Pacific R. R. Co., 115 La., page 1, the last decision on this point, the court said:

"We are of the opinion that the term 'accidental and uncontrollable events,' as used in Article 2754 of our present Civil Code, is the equivalent of 'cas fortuit ou force majeure' of the French text of Article 2725 of the Code of 1825. In the civil law loss by fire is not considered a fortuitous event, as it arises almost invariably from some act of man. At common law the carrier is considered as in the nature of an insurer against loss by fire, unless it be caused by lightning. (Hutchinson on Carriers, 132). The Civil law does not go to this extent, but it does require the carrier to prove the precise cause of the fire; that it was impossible for human prudence to foresee or prevent the loss, and that no act of imprudence or negligence is chargeable to the carrier."

The Court further erred in maintaining the following limitation of defendant's bill of lading.—

"Neither this company nor any of its connecting carriers shall be liable for any damage to or destruction of said property by fire, unless such damage or destruction shall result directly and exclusively from their negligence or that of their employees, and unless such negligence shall be affirmatively established by the owner of said property."

Under this limitation "a common carrier could contract ad libitum against its negligence no matter how gross and inexcusable, but if any natural or physical cause intervened or contributed to the result, the carrier would not be liable. For instance: Carrier could negligently expose valuable freight to the rain, and then plead that
120 the rain was a contributing cause. In other words, under this limitation, carrier's negligence would have to be the first and last links in the chain of causation, an ultimate first cause, unknown save in metaphysical speculation. This Court has repeatedly held that while a carrier may limit its liability, it can never go so far as to contract against its own negligence."

This restriction must be interpreted by Louisiana law. (See Minor on Conflict of laws, page 169). This Court has repeatedly held that a carrier cannot contract against its own negligence.

See the following decisions: Cranwell, vs. Ship, Fanny Fosdick, 15 La. Ann. 436; Insurance Co. vs. R. R. Co. 20 An. 302; Roberts vs. Riley, 15 An. 103; Price vs. Ship Uriel, 10 An. 413; Blakely and Hawkins vs. Gordon, 7 An. 235; Van Horn vs. Taylor, 2 An. 587; Perets vs. Railroad, 16 An. 222, 18 An. and 18 An. 279.

The Court further erred in this particular case, because defendant averred in his answer freedom from contributory negligence in the following words:

"Respondent avers that this happened without any contributory negligence on its part, and that the said sudden and unprecedented flood which could not have been anticipated with the resultant fire, was the proximate cause of the destruction of the plaintiff's property.

Respondent avers further that the said cars were not unreasonably delayed and that nothing could have been done by respondent which was not done to save the said property."

Here defendant after admitting the loss avers that he did every-

thing possible to protect the goods. The burden is certainly then upon him to show that.

The Court is further in error in finding the following matters of fact.

On page 18, the opinion reads: "The name "North Augusta" does not appear in the transcript, so far as we remember, nor is there anything there about lumber mills."

On page 32 of the transcript, G. A. Beson, Car Inspector of the Southern Railway, testified as follows:

"The current through that yard was not nearly so swift in 1888, and I think the reason is that there were no mills and lumber yards built in North Augusta then, and, therefore, there was nothing like the amount of drift wood and lumber against the trestle that there was in 1908."

The Court is again in error in stating on page 20 as fol
121 lows:

"There is nothing about the running of the passenger trains, * * * "

On page 26 of the transcript, H. L. Thompson, Switchman of the Railroad Company, testified as follows:

"On the morning in question we reached the Hamburg yard at about 7:20 A. M., just ahead of the passenger train, which was leaving Augusta for Charleston, S. C. Upon reaching the Hamburg yard, we had to get off of the main line on to a side track in order to allow the passenger train go by. At that time the tracks and switches were under water and in order *at* get to the old Hamburg yard, where the freight cars were, we had to change two switches."

The Court further erred in finding as a matter of fact the following:

"On the other hand, according to the oral testimony adduced, and a blue print which purports to show certain features of the Hamburg yard, including the position of the cars that were destroyed, 33 feet of water 'would not do any damage to tracks or cars in Hamburg, yard."

The blue print shows that the water at the telegraph office, which is in the yards of the defendant Railroad Company, near its tracks, was five feet over the rail. Though we take the presumption of the Court that it rose its fastest about 7 A. M., (which presu*m*ption, we shall presently show is not correct), and this high rate lasted until 10:30 o'clock when the water, according to the weather bureau report, was 34.4 feet; at eight o'clock, two and one half hours earlier it could not possibly have been more than 32.65 feet. Marcus, the operator, says in his testimony on page 37 of the transcript, that at eight o'clock when he left the office the water was two feet deep in front of the office and covered the *the* rails generally in the yard. His statement must be taken as true, and the water at 33 feet must have been at least two and one-half feet in front of the telegraph office, and the tracks must have been completely submerged. The evidence further shows that the trestles went down and the cars were abandoned when the gauge read about 32 feet. The Court evidently

takes the testimony of Superintendent Hungerford on page 40 of the transcript as absolutely true and correct, though contradicted by the statement of another witness and partially by the
122 blue print itself.

We contend that the tracks were bound to be at least two and one-half feet under water at this stage of 33 feet and that the officials should have known from the flood of 1888, which was only one inch lower, that the tracks would be injured, and the statement that such a flood with a strong current would do no damage to the tracks is preposterous on the face of the record.

The Court presumes that the water rose most rapidly about seven o'clock in the morning. What are the facts? The weather bureau reads as follows:

"On August 25th, the river gauge at Augusta registered at that time a height of 11.9 feet. On the morning of the 25th the river had arisen to 22.3 feet and reports indicated the following heavy rain falls for the preceding 24 hours: Anderson, 5.50 inches; Calhourn Falls, 3.65 inches; Washington, Ga., 1.28 inches; Greenwood, 1.94 inches. A flood warning was then issued forecasting a stage of 33 feet at Augusta within the next twenty-four hours."

The water in the twenty-four hours between the morning of August 24th and August 25th., rose 10.2 feet, which was at the rate of .42 of a foot per hour. Now the time of reading the gauge is not given, but presumably it was earlier than 10:30 o'clock. However, we take the worst for plaintiff and suppose that each day the gauge was read at 10:30 o'clock, then during the next twenty-four hours, between the morning of August 25th., and August 26th., it rose 12.2 feet, which is the rate of .5 of a foot per hour. Th-se calculations show that the water had then been rising steadily for two days, a little faster on the second day than on the first. On the argument of the case it was stated by one of the Justices that the presumption was that the water would rise very much more slowly after it got out of the banks and spread over the yards, and we have shown above, conclusively, that the water was at least two feet in the yards at eight o'clock before the 33 feet gauge was reached. At seven the water had reached the yard and covered a switch stand quickly.

In conclusion we beg to call the Court's attention to the fact that the weather bureau reported that there would be a stage of 33 feet at Augusta within twenty-four hours from the morning of
123 August 24th. The time is not given, and there is absolutely no basis for the presumption that this gauge of 33 feet was to be reached at a specific hour on the morning of August 26th. The trained experts of the weather bureau probably reported the rise exactly, for according to the calculations made above, the water must have been 33 feet about nine o'clock on the morning of August 26th, at which time the gauge is usually read, and it was before this depth was reached that the trestles sank and the fire in the engine was put out. There was absolutely no reason to place our cars over on what was practically an island at one o'clock in the morning, when an engine crew was on hand and they could have been put on the high ground, where some of the cars were removed

to on the morning of the 26th., for yardmaster Hayhoe testified as follows:

"I moved all other cars that I could reach on to high ground and weighted down main track trestles with cars and one trestle in the old Hamburg yard."

He further states that he had a message from the superintendent on the night of the 25th telling him about the flood, and though the water was rising at the rate of one-half foot per hour, he saw no reason to believe that the flood would do anything unusual. If this be the prudence which an ordinary man would show in looking after his own property, then indeed has it become an age of socialism?

We wish to emphasize the fact that there has been a tremendously heavy rain fall in the water shed just above Augusta on the morning of the 24th., and this is shown in the quotation taken from the weather bureau report above.

This Honorable Court has quoted extensively in its opinion from the able decision of the South Carolina Supreme Court by Judge Hydrick, the case of Ferguson v. Southern Rwy. Co., which is particularly applicable here, wherein this defendant was being sued for the loss that had occurred in the same flood, and we beg to conclude our petition with the following apt words from that decision.

"Besides the two lines mentioned, the defendant operates
124 other roads in the State which pretty well cover the territory traversed by those rivers and their tributaries which form the Congaree and Wateree, and it has along its road telegraph lines as a means of communicating intelligence as to conditions affecting the proper operation thereof. The United States government has a weather bureau at Columbia which co-operates with the railroads in obtaining and sending out information relative to the physical conditions which affect the operation of the roads. It maintains gauges at different places on the principal rivers from which reports are sent in and a record of them is kept. In times of high water in the rivers, flood warnings and bulletins giving information of the present and probably near future conditions are issued, and sent to those who are interested. Besides its own sources of information, the services of this bureau were at defendant's command. Ordinarily, therefore, the defendant would be expected to keep its agents advised of the approach of floods of such magnitude as to cause apprehension of danger. The testimony shows that, in this instance, the defendant was advised of the conditions existing throughout the State on the streams tributary to the Congaree and Wateree; and that it knew that, beginning about the 19th of August, rains had been continuously falling over the watersheds of these streams; and that, beginning about the 23rd, they became unusual, both in quantity and in the extent of territory covered; so that, by the 24th, nearly all the streams in the upper part of the State began to rise, and on the 25th and 26th they had reached the flood stage. It was known that the floods in some of the larger of these streams were unprecedented in magnitude and destructive power. It was also known that they would surely find their way into the Congaree

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and Wateree. Defendant also knew the records of previous floods in these rivers. * * *

So far as it appears from the testimony, both the engines at Kingville stood there idle from 7 to 11 o'clock. Either could have carried the cars containing merchandise to Gadsden, a station on defendant's road about four miles from Kingville, and put them in the side track there. It is said, however, that the reason this was not done was because no one thought, or had any reason to think, that the water would rise as high as it did. Bearing in mind, however, that the defendant knew of the extraordinary floods in nearly all the tributaries of the Congaree and Wateree; and, therefore, that it should have anticipated, as it evidently did, an unprecedented rise of the water at Kingville; and that the water had already risen from 2 to 3 feet above all previous records, and was then rising at the rate of 2½ inches an hour, the question whether an ordinary prudent and diligent person would then have thought that the time had come to take steps to save property which was exposed to the perils of such a flood is one about which reasonable men might differ."

Respectfully submitted,

(Signed) GUSTAVE LEMLE.
" W. CATESBY JONES.
" ARTHUR A. MONERO.

(Endorsed:) No. 18,579—Supreme Court, State of Louisiana. National Rice Milling Company vs. New Orleans & Northeastern R. R. and Southern Rwy.—Petition for Rehearing. Filed May 6, 1912. (Signed) Paul E. Mortimer, Clerk.

125 *Rehearing Granted.*

(Extract from Minutes.)

NEW ORLEANS, *Monday, January 20th,* 1913.

The Court was duly opened, pursuant to adjournment.

Present—Their Honors: Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Provosty, Alfred D. Land and Walter B. Sommerville, Associate Justices.

By the Court:

No. 18579.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN R. R. CO. and SOUTHERN RAILWAY.

It is ordered that the rehearing applied for in this case be Granted.

Cause Called, Argued, and Submitted.

(Extract from Minutes.)

NEW ORLEANS, *Wednesday, March 5th,* 1913.

The Court was duly opened, pursuant to adjournment.

Present—Their Honors: Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Provosty, Alfred D. Land and Walter B. Sommerville, Associate Justices.

No. 18579.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. and SOUTHERN RAILWAY CO.

(On Rehearing.)

This cause came on this day to be heard on the rehearing granted.

Mr. W. C. Jones opened for the plaintiff, appellee; Mr. J. B.
126 Monroe replied for the defendant, appellant; and Mr. Gustave Lemle closed the argument. The court then took the cause under advisement upon the papers on file.

Final Judgment on Rehearing.

(Extract from Minutes.)

NEW ORLEANS, *Monday, April 14th,* 1913.

The Court was duly opened, pursuant to adjournment.

Present—Their Honors: Joseph A. Breaux, Chief Justice, and Frank A. Monroe, Olivier O. Provosty, Alfred D. Land and Walter B. Sommerville, Associate Justices.

His Honor, The Chief Justice, pronounced the opinion and judgment of the Court in the following case:

No. 18579.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. and SOUTHERN RAILWAY.

(On Rehearing.)

(On Motion to Dismiss:) Motion to dismiss overruled.

(On the Merits:) For reasons stated, it is ordered, adjudged and decreed that the judgment of this Court, heretofore rendered is avoided, annulled and reversed. It is ordered, adjudged and de-

creed that the judgment appealed from is affirmed, except as to the date of interest, which will now begin to run from the date of the judgment instead of from judicial demand. In all other respects, the judgment as amended (as to interest) is affirmed. Ap-
127 pellees to pay costs of appeal.

His Honor, Mr. Justice Monroe, adheres to the views expressed in the original opinion and for reasons hereafter to be handed down and dissents from those herein expressed.

128 *Opinion of the Court on Rehearing.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

NEW ORLEANS, *Monday, April* 14, 1913.

The Court was duly opened, pursuant to adjournment.

Present—Their Honors: Joseph A. Breaux, Chief Justice; Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Walter B. Sommerville, Associate Justices.

His Honor, the Chief Justice, Pronounced the opinion and judgment of the Court in the following Case:

129 Mr. Chief Justice Breaux.

MONDAY, *April* 14, 1913.

No. 18579.

NATIONAL RICE MILLING COMPANY
vs.
NEW ORLEANS & NORTHEASTERN R. R. Co. and SOUTHERN RAILWAY COMPANY.

On Rehearing.

On Motion to Dismiss: Plaintiff filed the following motion to dismiss the appeal.

"On motion of Hall, Monroe and Leman, counsel for the New Orleans and Northeastern Railroad Company and the Southern Railway Company, and on suggestion, the final judgment was rendered herein against both of these defendants in solido on the fifteenth of November, 1910, that judgment having been signed on the twenty-first day of November, 1910, that movers are advised that there is error in said judgment to their prejudice, and that they desire to appeal therefrom suspensively."

It is ordered, that, upon compliance with the requirements of law, they be granted a suspensive appeal from the judgment.

It appears by the motion of appeal that the appeal was taken from

a judgment rendered against both defendants. Bond was furnished accordingly. The two railroad companies were granted an appeal.

The appeal was taken by counsel representing the defendants.

Counsel are not parties in interest in the case. The appeal
130 was taken for defendants. The motion has no merit.

It is overruled.

On the Merits: Plaintiff claims the value of two cars of rice, valued, plaintiff alleges, at two-thousand-three-hundred-twenty-six and 50/100 dollars net.

Plaintiff charges the destruction of the property to the negligence or want of care of the Southern Railway Company.

The following is an excerpt from the bill of lading:

"This company or other carriers over whose lines the property may pass shall not be held responsible for loss or damage (unless to prove carelessness or negligence of their employés) resulting from the leakage of oil, and so forth; nor for loss or damage to any article resulting from heat, cold, fire, flood, storm, mobs or other causes not subject to carrier's control. Neither this company nor any of its connecting carriers shall be liable for any damage to, or destruction of said property by fire unless *such damage or destruction shall result directly and exclusively from their negligence or that of their employés, and unless such negligence shall be affirmatively established by the owner of said property.*" (Italics ours.)

Plaintiff's contention is that the clause of the bill of lading before cited place upon defendants the burden of proving that the destruction of the property was due to accidental and uncontrollable causes and that it was impossible to prevent the loss, and that they are not chargeable with any act of negligence. This contention will be considered later.

There is no dispute about the value of the rice, but the
131 defendants deny their liability for the loss of the rice as charged.

The rice and the cars were destroyed in the old Hamburg Yards (N. C.) of the Southern Railway Company near Augusta, Ga., on the afternoon of the twenty-sixth of August, 1908.

One of the defendants sued—that is, the N. O. & N. E. R. R. Co.—denied that plaintiff has a cause of action; the other defendant, the Southern Railway Company, urged that it is protected by a bill of lading, in which it is stipulated that it would not be liable for property destroyed by accident or uncontrollable force.

Many of the issues are of fact.

The yard clerk at defendant's yard, Hamburg, N. C., swore that on the morning of Aug. 26th, 1908, he received car 12,406 and car 15,545 from the Georgia R. R. They are the cars which were afterwards destroyed. He had them placed in a train of cars which was being made up for Charleston. The moving from a safe place to the Hamburg yards must have been previous to six o'clock for he informs us that he "knocked" off work at six o'clock A. M. on the morning of August twenty-sixth. "The rise (on that morning) was very rapid and unexpected."

Another employé, an inspector, Southall, swore that the cars re-

ferred to were received from the Georgia R. R. on Aug. 25th, 1908; that two of the cars—the cause of the accident—contained quick lime.

The question suggests itself: Why make up a train with two cars of lime (after the high water mark warning) in the lowest part of defendant's yards? This witness further swore that he never had seen the water as high except in the freshet of 1888, so that, according to this testimony, the rise was not entirely unprecedented.

132 An employé, Norris, inspector, swore that these two cars loaded with lime were received on Aug. 24th, 1908, and transferred to the general freight yard.

One bill of lading was dated Aug. 22, 1908, and the other, Aug. 24th, 1908, although shipped on different days they were both at Augusta at the same time.

The cause of the delay of these cars in Augusta is not explained.

The yard master for the Southern Railway Company at Hamburg, S. C., testified that the condition of the yard was normal; that the yard was in his charge from seven o'clock A. M., and that the switch foreman was in charge at night. That there was a full crew during the day and a full crew at night, and one engine from twelve noon to twelve mid-night. That he received a message from the Superintendent on the evening of Aug. 25th, that the indications were that there would be a rise in the Savannah River. Until twelve o'clock that night, this witness said the River was not out of its banks, and there were no indications of a serious rise. That, when he went on duty at seven o'clock A. M. of August the twenty-sixth, the River was rapidly rising, and in thirty-five minutes it had risen so rapidly that it covered a switch stand; that when he came on duty he saw that the River was rising and he took an engine and tried to reach the cars. On the main track to old Hamburg, there were three trestles, and one of these trestles was undermined by the rapidly running water so that he could not get the engine over the trestle to reach the cars. That he moved all other cars to high ground and weighted down the main trestle with cars and one trestle in the old Hamburg Yard also. That altogether thirty-seven cars were destroyed in the Old Hamburg Yard by fire, caused by the

133 water reaching a car of lime and slacking the lime and setting fire to the cars. That the cars in the Hamburg Yards were made up into trains to be moved on the order of the inspector. That people living in Augusta for years did not anticipate the unprecedented rise. A number of buildings were ruined. Others were destroyed by fire. That in the freshets several men were drowned in trying to escape from one of the buildings. He had seen the River rise several times previous to Aug. 26th, 1908, and witnessed heavier rains but had never seen the River extending over its banks, and he had never seen the River rise into the yards previous to Aug. 26th, 1908. He states that the car of lime, to which he has before alluded, took fire at five o'clock P. M. on Aug. 26th, 1908; the water had reached the car before that time but the lime with which it was loaded was slacking and did not ignite before five o'clock P. M. on the twenty-sixth of August.

The switchman of the W. & A. Railway Company at Atlanta, swore

that on the twenty-fifth, twenty-sixth and twenty-seventh of August, 1908, he was working for the Southern Railway Company at Augusta, Ga.; that the old Hamburg Yard was submerged by water to a height which put the water several feet in the freight cars which were standing in the yard. He had been living in Augusta, Ga., for about twenty years and had never seen the River as high; and that there was a rapid current in the Hamburg Yard. That, while he has no record of the previous high water, the flood of 1908 was by far the highest and most destructive that he had ever seen. He reported for work at seven o'clock in the morning of August 26th, and he and others reached the Hamburg Yard
134 about twenty minutes after seven o'clock A. M., and that upon reaching the yard they had to get off the main line on to a side track in order to let a passenger train go by. It seems that even at that time passenger trains could run over the tracks. Witness further states that, at that time, the tracks were under water, and, in order to get to the old Hamburg Yards, where the cars were, they had to change two switches. That this necessitated the cleaning out of sand and mud from between the rails and consumed some little time. That they then proceeded to the old Hamburg Yards for the purpose of pulling out the cars. In order to do this, they had to pass over three trestles. When they passed the trestle designated as the "scale trestle" it sunk down six or seven inches, showing that it had been undermined; and that when they passed the next trestle and pushed the tender upon it, that it went down ten inches; that they were afraid to go any further. That they were all on the top of the tender at the time ready to jump off if the engine turned over; that as they could proceed no further, the engineer jumped in his cab and stopped the engine; that they returned and in passing the scale trestle they noticed that it went down further than when they passed the first time. That then they pushed three gravel cars on the scale trestle to hold it down and keep it from floating away. That the other trestles had floated away. That he remained working in the yard until eleven o'clock; that the water was high and the current strong so that they could do nothing to save the freight. That they did not at any time think the water would rise sufficiently high to get into the freight cars. That he had to return to his home to see to the safety of his family; the floor of his home being under water, he had to remove his furniture to the second story. That the water rose rapidly and suddenly. That he also mentions that the cars destroyed were located on tracks Nos. One and
135 Five in the old Hamburg Yards, designated on the old blue print.

We are impressed by the fact in all this that the attempt at rescuing property was only made after eight o'clock in the morning of August the twenty-sixth.

Henry P. Tyler, inspector, said: "The old Hamburug Yards were submerged by water on the twenty-sixth and twenty-seventh of August, 1908; the water rose about six feet in the yards; there was a strong current, caused by the lumber, trees and drift wood which were banked up against the railroad trestle to a height of about six feet. There were two trains of freight cars in the yard, ready to go

out. When they discovered the fire in the cars, they endeavored to find a boat; telephone communications, he said, had been abandoned as the line by rise of the water could no longer be used and they had to wait until some one happened to come within hailing distance in a boat. After a time, they did find a boat; he and three others rode out to the train of cars that were burning and put out the fire by throwing buckets of water on them. They stopped the fire just before it reached a car load of sheep and saved them. There were logs, wood and timber floating in the current. He was upon the trestle of the Hamburg Yards about eight o'clock A. M. of August the twenty-sixth, and helped to move away the drift so as to try and keep an opening under the trestle to let the current flow through. This was before he went in the boat to help put out the fire in the freight cars.

The inspector for the Southern Railway Company, Mr. Benson, testified, that, on August 25th, 1908, there was no water
136 in the Southern Railway Company's yard at Hamburg; that on the morning of Aug. 26th, he reported for work at seven o'clock and at that time the water had just reached the rail in front of the block office, and from then on the water rose at an increasingly rapid rate until it finally reached a height of five and a half feet in the yard with a rapid current flowing through. He was employed at this place as early as 1888. During the freshet that year (1888) the water ran over the yard; that the current was not as strong in 1888. That the River was higher in 1908 than in 1888. That the overflow was unprecedented. That at half past eight o'clock on the morning of Aug. 26th, he saw engineer Dent with his crew try to reach the cars which were stationed on tracks Nos. One and Five in the old Hamburg Yards; when the tender of the engine was pushed upon the scale trestle, he saw it sink several inches, and a few minutes later he saw them abandon the effort to reach the cars in the old Hamburg Yard; that about two o'clock in the afternoon, a fire broke out in one of the cars; that they could not go to the rescue of these cars because they had no boat. That the next morning they found a boat and that he and three other men rode to the cars and stopped the fire.

Over twenty witnesses have testified. For that reason, we will endeavor to abbreviate from this on.

All witnesses agree in stating that the Hamburg Yards were dry and free of water on the twenty-fifth of August, 1908. Several of the witnesses reported to work at about the usual hour (seven o'clock); some formed part of the crew and the other employés at other occupations in and about the yards. Why did they not make a serious attempt to move the cars on the morning of the 26th, when they reported for work?

It also appears that the cars containing plaintiff's rice were
137 taken to the Hamburg Yards about one o'clock on the morning of the twenty-sixth of August, 1908.

The question arises—why was it that they put the cars in the low old Hamburg Yards after they had received warning of the coming flood?

On the twenty-sixth of August, 1908, there was some delay in the movement of the engine in order to allow a passenger train to pass and one of the witnesses testified that about this time the rails and switches in the Hamburg Yards were covered by water, and, in order to get to the tracks, upon which the loaded freight cars were standing, it was necessary to change switches.

The night operator testified that he worked as night operator from eleven o'clock P. M. on the night of the twenty-fifth until eight o'clock on the morning of the twenty-sixth of August, 1908; that he received a communication on the night of the twenty-fifth forecasting the height the water would rise. When he left the office in which he was busy on the twenty-sixth, the water had risen about two feet in front of the block house and as far as he could see covered the tracks in the yards generally.

The superintendent, Hungerford, testified that on the 25th of August, the stage of the water of the Savannah River was reported as twenty-two feet, three inches on the gauge of Augusta, and that a report was issued from the weather bureau of a probable rise to a stage of thirty-three feet at Augusta. That, on the morning of the twenty-sixth, the Savannah River rose rapidly higher than had been anticipated by the before mentioned forecast. By noon of August the twenty-sixth, the River had reached a stage of thirty-six feet, continuing to rise and reaching a stage of thirty-eight feet,
138 eight inches about two o'clock A. M. on Aug. 27th. That excessive rains fell in the northeast portion of the State from the twenty-fourth to the twenty-sixth and caused great damage by floods and the rapidity of the current. At ten o'clock on the twenty-sixth, the gauge registered thirty-four feet and seven inches, and the River was rapidly rising. At that time, supplemental warning, was issued by the weather bureau placing the maximum stage at thirty-eight feet by mid-night.

The defendant contends that the water of the Savannah River was within in its banks when the gauge was thirty-three feet. This is significant if the water was within the banks—there was no overflow up to that time on the 26th, and it follows that the cars could have been moved.

We infer that it rose, according to defendant's theory, above its banks after the gauge rose above thirty-three feet.

The gauge of water, according to the last above mentioned witness, was thirty-four feet and four inches at ten o'clock. From this it follows that the depth of water was one foot and four inches in the railroad yards, but previous to that, when the gauge was at 33 feet according to some account the river was not over its banks.

The yard conductor, C. W. Sykes, testified that the cars in question, in which the rice of plaintiff was, formed part of the train which was to leave for Charleston, South Carolina. He says that he left the yards at six o'clock, went to breakfast, came back to the office at half past seven o'clock P. M. He worked in the office until eleven o'clock and then had to wade in water neck deep to return to his home. That was all he did. Not the least warning appears to

have been given to any one in regard to the rising waters, of which he had received notice.

139 A close reading of the evidence compels the conclusion that there was not sufficient forethought on the part of the officers in charge of the railroad yards. We have seen that the River was rising rapidly on the morning of the twenty-sixth of August. Some of the witnesses testified that by seven o'clock it had covered the switch tracks, and yet nothing was done to protect property. Leisurely enough, the employés went about their business and gave very little concern to the rising waters. Those who did attempt to save property (if what they did can be considered in that light) displayed very little activity; beginning at eight o'clock, taking out a few cars and leaving others in the old Hamburg Yards that is all they did. These yards were submerged by water to a height above the floor of the cars. The question arises—was it possible before the waters reached their greatest height to move the cars to a safer place than where they were hauled to on the morning of the twenty-sixth of August, that is, to the Old Hamburg Yards? We have noted, before eight o'clock or eight-thirty o'clock A. M., not the least attempt was made to move the cars out of the yard where they had been placed. Mr. Benson, inspector of the Southern Railway Company, testified that on the morning of the twenty-sixth of August, he reported at the Hamburg Yard at seven o'clock to go to work, and at that time the water had just reached the rail in front of the block office. There were a crew and an engine in the yard. Why were they not put at work at that time to save the freight?

Another witness, the night operator, renders it still more evident that it was possible to move the train in the morning for he says that when he went to work the yard was entirely free from

140 water on the twenty-sixth of August in the morning. An attempt was made to rescue the cars between eight and half past eight o'clock A. M.; it failed. They went too late to rescue these cars. There had been ample time to save them.

The oral testimony leads to the inference (as well as the blue print in evidence) that the old Hamburg Yard is lower than the new yard. According to the blue print in evidence, the water was quite above the rail of the track and rose into the cars, while at the Yard and telegraph office it was five inches over the rails. This was one of the reasons why they should have been careful not to run the cars into the old yard (the lowest place), after having received notice of the rise of the waters.

They should have gone to the old Hamburg Yard and put out the fire. This they did on the twenty-seventh when the waters were higher, as witness states, than they were on the twenty-sixth, and still they met no difficulty in extinguishing this fire.

One of the reasons given for not going to the cars on fire the day previous, as witness states, was that they had no boat and waited for a boat to come in hailing distance in order to cross over to the old Hamburg Yard. It seems no boat came on the twenty-sixth. It does seem strange that near a City a boat could not be gotten on the

first day. We do not infer that they were cut off entirely from the City where there were boats.

The rise of the waters in the Savannah River over its banks was not entirely unprecedented although the rise of thirty-eight feet and eight inches was. Had preparations been made to meet the usual rise, the result would have been different.

From the following, it is made evident by the records of four of the floods, indicated by the astericks infra, from the year
141 1888 to and including the year 1902—by which Hamburg was visited were higher than they were on the morning of the twenty-sixth, when the defendant made an attempt at rescuing the cars:

Year.	Date.	Height.
1888.	Sept. 11th	38 ft. 1½ in.
1891.	Jan. 15th	29 ft. 5 in.
1892.	Jan. 11th	30 ft. 6 in.
1894.	Apr. 6th	29 ft. 4 in.
1895.	Feb. 8th	31 ft. 0 in.
1896.	Apr. 4th	21 ft. 3 in.
1897.	Mar. 9th	35 ft. 5½ in.
1898.	Oct. 11th	27 ft. 9 in.
1899.	July 10th	30 ft. 3 in.
1900.	Sept. 3rd	28 ft. 5 in.
1901.	Feb. 14th	32 ft. 8 in.
1902.	Mar. 1st	34 ft. 7 in.

Other years between 1888 and 1908, than those above noted, the rise was not over twenty-seven feet.

These floods were frequent and yet defendant remained indifferent and even sent its cars to the lowest places on the yard, where they were permitted to remain without making a serious and timely attempt to take them away.

From all this evidence, we are led to the inference, which we think is positive, that there was negligence. A little timely activity would have brought about a different result, and would have saved plaintiff's property, or would have placed defendant- in a position to successfully defend themselves.

Unquestionably, the River was rising rapidly on the morn-
142 ing of the twenty-sixth at seven o'clock; in thirty-five minutes it covered the switch tracks. It does not seem that anything was done to prevent the destruction of the cars. Leisurely enough, the employés went about their respective occupations, and now, when they give an account of themselves, it does seem as if they wish to lay all the trouble on the rising waters although they remained indifferent when they should have exerted themselves.

From the first, there is evidence that the trestles were unsafe; prematurely weak, so much so that early in the rise they were washed away. Trees and lumber were allowed to bank up as they drifted down against these trestles; nothing was done to relieve the situation

at this point although trees were pressed down the current, passing under and undermining the trestles. A former employé came to the place and saw the danger; he moved away the banked up debris as well as he could, though he was not in the employ of the defendant. When asked why he had worked as he had, his reply was that he wished to help the companies. He, the former employé, worked to save property, but the railroad people did nothing to move away this obstruction. The employés were not as mindful of the necessity of taking care of freight as they should have been. They thought it may be that the waters would not rise sufficiently high to get into the freight cars. In this, they assumed too much. The reports received in regard to the flood did not justify that assumption. The cars were ready to be hauled away; no one testified why they were not hauled to destination.

Now as to a vis major—that is the burden of the defence's complaint.

Vis major, when proved, is a controlling plea, provided the
143 carrier does not by his negligence contribute to the loss.

In the first place, in regard to the evidence of the height of the water, the negligence charged and the damages upon whom lies the onus of proof?

The Code, Art. 2754, clearly states that, in order to be relieved from liability, the carrier must prove *"that such loss or damage has been occasioned by accidental and uncontrollable event."* (Italics ours.)

The law requires him (the carrier) to prove the uncontrollable event which he alleges. Civil Code, 2219; 2232; 1923.

The following decisions are pertinent: Montgomery & W. P. Rice Co. vs. Moore, 51 Ala., 394; McCarthy vs. Louisville & N. R. R. Co., 102 Ala., 193, (48 Am. St. Rep., 29, 14 So., 370); Central R. R. Co. vs. Hall, 124 Ga., 322, 94 L. R. A. (N. S.) 898, 110 Am. St. Rep., 170, 52 S. E. 679, 4 A. & E. Ann. Cases, 1280; Pittsburg C. C. & St. L. R. Co. vs. Hitchell (Ind.) 91 N. E., 735; Read vs. Spaulding, 30 N. Y., 630, 86 Am. Dec. 426, affirming 5 Bosw., 395; Heyl vs. Inman, S. S. Co., 14 Hun., 564; Dunson vs. New York C. R. R. Co., 3 Lans., 265; Graham vs. Davis, 4 Ohio St., 362, (62 Am. Dec. 285); Fentiman vs. Atchison T. & S. R. R. Co., 44 Tex. Civ. App., 455 (98 S. W., 939).

But, as carriers are bound to some vigilance, if a little vigilance and forethought might have prevented the loss the defendants are liable for the amount of the loss. They failed to prove ordinary care.

Under the French Law, if the management, in case of an emergency of account of an accidental or uncontrollable event, is that of the father of the family it is a complete protection.

144 Defendants' managements were not of that character. They were not sufficiently prudent and cautious. There was a general rise of all the waters above; they saw the rising waters; it behooved them to give attention to the threatening condition.

They invoke the forecast of the weather bureau; that this bureau did not give notice of the highest rise of the waters within an inch.

The for-cast of extreme height was thirty-eight feet, and the rise was thirty-eight —, eight inches and a half.

This complaint directed against the weather bureau is not a complete defense unless reasonable activity was brought to bear in due time. It was not. The railroad people were warned to better protect themselves against the accident.

There was unconcern; as evidence of this, we recall that the yard conductor, on the morning of the loss (from 7.30 to 11 o'clock) worked around the office, and then went home.

There were an engine and crew on the yard; they were not timely called upon to prevent the loss, or, if called, it is not proven. It was an emergency; some concern ought to have been shown to prevent the destruction of the property. This is the impression created by the evidence; if it were different, if those in authority and those under their orders on the occasion were sufficiently active, the evidence on the subject is weak and not convincing. The emergency required a little more vigilance than usual. There was possibility of foreseeing things and of moving in the direction of saving the property.

As to the waiver in the bill of lading covering risks: it is some protection to the carrier barring his own negligence. But, none the less, for loss occasioned by ordinary negligence, the carrier is
145 liable notwithstanding an agreement.

Insurance Co. vs. R. R. Co., 20 A., 302.

If there is a special agreement it will not be a protection for the careless-ness or unskillfulness of the crew.

Roberts vs. Riley, 10 A., 103.

In another decision, it is decided that no waiver will be considered as exemption from liability from leakage occasioned by his fault or negligence of himself or his agent.

Thomas vs. Ship Morning Glory, 13 A., 269.

Similar views are expressed in Darrell vs. Southern Pacific R. R. Co., 47 A., 1455.

Price vs. Ship Uriel, 10 A., 413.
Blakely & Hawkins vs. Gordon, 7 A., 235.
Van Horn vs. Taylor, 2 A., 587.
Peters vs. Railroad, 16 A., 222.
Frank vs. Adams Express Co., 18 A., 279.

On the rehearing only, the contention is that the suit is to be governed by the Carmack Amendment to the Interstate Commerce Act, interpreted in the Croninger case, 226 U. S., 148. But if it is to be governed by that decision, defendant would not be in much better position.

We are not impressed by that view.

Admitting for a moment all that is claimed under the Carmack Amendment—Under any of the laws of this Country, indifferent railroad people, who receive freight to be transported some distance and who just before the waters of a storm have flowed down stop the cars on the way and run them to the lowest part of their yards

and place them next to cars loaded with quick lime, easily ignited by water, and leave them at that place while other cars are
146 taken out and who make no attempt to haul them out although the waters are rising slowly enough for such work after warning given, are not protected from the charge of negligence under the law. The decision in Railroad Co. vs. Reeves, 10 Wallace, 197, cited by defendants, is not determinative of the issues considered from any point of view. In this last cited case, reviewing another decision, the Court, through Justice Miller, said, in substance, that the law requires some skill and forethought of carriers. If judged from that point of view exclusively, the carrier is not excused unless he shows some activity in protecting property in case of necessity.

As relates to the Adams Express Co. vs. Croninger, 226 U. S., 148, on which reliance is placed: It does not appear that the rules of evidence have been changed by the interpretation laid down in that decision so as to shift the burden and to have the effect of nullifying the Civil Code of this State upon the subject.

The amendment known as the Carmack Amendment invalidates the provisions of any State law nullifying contracts limiting the liability of a carrier for loss or damage to the agreed or declared value. The amendment is silent about evidence. There is a great difference between the "agreed" value of freight, as set forth in the bill of lading, to be accounted for in case of loss and the onus of proof in case of loss of freight.

To return for a moment to the Croninger case above, it appears that, under the laws of Kentucky, the contract limiting the plaintiff's property to the "agreed value" gave rise to the question
147 at issue. The Federal Supreme Court held that the Carmack Amendment of the Interstate Commerce Act was controlling as relates to the value of property lost. The "value clause" is expressly referred to in the decision.

We annex a copy of the amendment in the margin, containing all that there is upon the subject in the Federal Interstate Law. Not one word expresses the intention of repealing the rule fixing onus of proof under State Statutes. Save that—as there are specimen- of the others. Patton vs. Pickles, 50 La. Ann. 857 and Spurlock vs. Traction Co., 118 La., p. 1.

There is no necessity of citing our decisions as they uniformly hold that the onus is with the defendant.

The State law should undoubtedly stand as it is as it is not in conflict with Federal law or jurisprudence.

The burden was on the defendant to sustain the following allegation in its answer: Respondent avers that this happened without any contributory negligence on its part, and that the sudden and unprecedented flood, which could not have been anticipated, with the result and fire, was the proximate cause of the destruction of plaintiff's property. Respondent avers further that the cars were not unreasonably delayed and that nothing could have been done by respondent which was not done to save the property.

Defendant admitted the loss and averred that it did all it could. It should have proven the averment.

The report of the weather bureau showed that the water had been rising steadily for two days, faster on the second than on the first day.

148 The Supreme Court of South Carolina, in Ferguson vs. Southern Railway Co., has explained its views in a well considered opinion, relative to the same storm of Aug. 24th, 1906. See same title, Vol. 74, South Eastern Reporter, p. 129. We insert extract from that decision relating to this same flood:

"The rule upon which this case must be decided was stated thus in Slater vs. Ry.: "Where an act of God causes injury to property in the hands of a common carrier, and such act is the sole of such injury, then the proof of this fact is a perfect shield. But, if there be any negligence on the part of the carrier, which, if it had not been present, the injury would not have happened, notwithstanding the act of God, the carrier cannot escape responsibility. And, the onus is upon the carrier to show not only that the act of God was the cause but that it was the entire cause; because it is only when the act of God is the entire cause that the carrier can be shielded. But, the fact that such an accident as the one complained of had never happened before is not, of course, conclusive of the fact that there was no negligence." In Vol. 13, of the same work, p. 721, it is said: "An extraordinary flood is to be classed among the acts of God which no human power can prevent or avert. Whether it will relieve the carrier from liability depends upon whether its results or natural consequences could, by the exercise of reasonable forethought and prudence, have been foreseen and guarded against; if the emergency was one that no human sagacity, guided by any of the known principles of human reasoning, could have anticipated, the carrier will be relieved." If, on the other hand, its effects might

149 have been foreseen by the exercise of reasonable diligence and prudence, a failure to so do would be negligence and subject the carrier to damages, although the original cause was the act of God." And, on p. 722 of the same volume, this rule is stated: "If the carrier discovers that goods intrusted to his care are in peril of injury or destruction by a flood, then it becomes his duty to use actively and energetically all the means at his command, of which it might be reasonably expected that one engaged in such business would possess to meet the emergency and save the property from injury, and any neglect to use the means above stated, which prudent, skillful men in that business might ordinarily be expected to use in such an emergency will subject the carrier to liability."

"It requires no citation of authority to sustain the proposition that after a carrier has discovered, or, by the exercise of reasonable prudence and diligence should have discovered, that goods in his possession are subject to the perils of an unprecedented flood, or other vis major, it is its duty to exercise reasonable care and diligence to save them from damage or loss.

150 Plaintiff's goods were destroyed at Kingville, which is a station on defendant's road from Columbus to Charleston, and is the point of junction on that road with another road

operated by defendant, running to Marion, N. C., via. Camden and Yorkville, the destination of plaintiff's goods. Kingville is situated in the fork of Congaree and Wateree Rivers, which unite about seven or eight miles below to form the Santee. It is between three and four miles from the Congaree and from five to seven miles from the Wateree. It is in the edge of the swamp of the Congaree, and the land between it and each of the rivers is low, flat swamp land, subject to inundations by freshets. The station is built upon made land and the railroad tracks are raised several feet above the adjacent swamps by embankments and trestles. The rivers meet approximately at right angles. Just below their confluence, there is a high bluff on one side and the highlands come down pretty close on the other so that the swamp is narrow. Therefore, in times of very high water in both the rivers the passage is inadequate and the waters are dammed up and thrown back in the swamp above.

Besides the two lines mentioned, the defendant operates other roads in the State which pretty well cover the territory traversed by those Rivers and their tributaries which form the Congaree and Wateree, and it has along its roads telegraph lines as a means of communicating intelligence as to conditions affecting the proper operation thereof.

The United States Government has a weather bureau at Columbia which co-operates with the railroads in obtaining and sending out information relative to the physical conditions which affect the operation of the roads. It maintains gauges at different places on the principal rivers from which reports are sent in, and a
151 record of them is kept. In times of high water in the rivers, flood warnings and bulletins giving information of the present and probable near future conditions are issued and sent to those who are interested. Besides its own sources of information, the services of this bureau were at defendant's command. Ordinarily, therefore, the defendant would be expected to keep its agents advised of the approach of floods of such magnitude as to cause apprehension of danger. The testimony shows that, in this instance, the defendant was advised of the conditions existing throughout the State on the streams tributary to the Congaree and Wateree; and that it knew that, beginning about the nineteenth of August, rains had been continuously falling over the watersheds of these streams; and that, beginning about the twenty-third, they became unusual, both in quantity and in the extent of territory covered; so that, by the twenty-fourth, nearly all the streams in the upper part of the State began to rise, and on the twenty-fifth and twenty-sixth they had reached the flood stage. It was known that the floods in some of the larger of these streams were unprecedented in magnitude and destructive power. It was also known that they would surely find their way into the Congaree and Wateree. Defendant also knew the records of previous floods in these rivers."

The Court can take notice of this rise of the waters particularly as it is the same storm that was felt in all parts of the State. Those occur from time to time in the Eastern and Western States. In our level section of country we have not the same experience ex-

cept when the waters break through the levees of the Mississippi. A crevasse may illustrate:

152 If a railroad crew were to receive notice through the weather bureau that a crevasse such as the Himelaya was flowing at some distance above and that the waters would rise at a place below and that the whole place would be submerged within a certain time mentioned, would it be thought good management if the railroad people were to remain indifferent although they had ample means to save everything?

They saved a part of the property; moved some of the cars at the station where they had been placed and allowed others to remain untouched. If they could so easily save a part of the property, why did they not save the whole?

For reasons stated, it is ordered, adjudged and decreed that the judgment of this Court, heretofore rendered is avoided, annulled and reversed.

It is ordered, adjudged and decreed that the judgment appealed from is affirmed, except as to the date of interest, which will now begin to run from the date of the judgment instead of from judicial demand. In all other respects, the judgment as amended (as to interest) is affirmed. Appellees to pay costs of appeal.

MONROE, *J.*:

"I adhere to the views expressed in the original opinion and for reasons hereafter to be handed down, and dissent from those herein expressed."

153 *Syllabus.*

On Motion to Dismiss: The facts do not sustain the grounds of the motion; the motion is, therefore, dismissed.

On the Merits: According to law and jurisprudence of this State, to be relieved from liability, the carrier must prove that the loss or damage has been occasioned by accidental or uncontrollable event, and this involves the proposition that the carrier must prove that it was free from fault.

No timely attempt was made to save the property.

Whether under the jurisdiction of the Supreme Court of the United States or under State law, the defendants were at fault and are liable.

There had been a general storm in the northern part of the State in which the cars were destroyed. There was warning given by the Weather Bureau of the floods; besides, the defendants had other sources of information. The water reached the flood stage on the twenty-sixth of August, 1908. The cars were left in the lowest part of the defendants' yards—anterior to the rise of the waters—and they failed to haul them out. The train was made up in part of the two cars destroyed; there were in the train on the yard cars loaded with lime which were ignited by water of the flood. On learning that there was to be an unprecedented rise, it behooved defendants

to be unusually careful with the car- loaded with lime and haul them away from the danger line.

154 (*Amendment, Referred to on Page* 19 *of This Opinion.*)

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful owner thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose line or lines such property may pass; and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damage or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

The original interstate commerce act of February 4, 1887, was extensively amended by the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp., 1911, p. 1281).

The above amendment is an excerpt from the opinion in Adams Express Co. vs. Croninger, Adv. Sheets, Supreme Court, October term, 1912, p. 149.

155 The following are the dominant features of that account as found in the opinion:

First. It affirmatively requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "property for transportation from a point in one state to a point in another."

Second. "Such initial carrier is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it."

Third. "It is also made liable for any loss, damage, or injury to such property caused by "any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass."

Fourth. "It affirmatively declares that "no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

The foregoing relates to limitation as to value, not to negligence. And, as to the difference, the Supreme Court of the United States said: "The limitation as to value has no tendency to exempt from liability for negligence." Hart vs. Pennsylvania R. R., 112 U. S., 331.

156 *Dissenting Opinion of Mr. Justice Monroe.*

Filed April 30, 1913.

No. 18579.

NATIONAL RICE MILLING CO.
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY.

Dissenting Opinion of Mr. Justice Monroe.

My conception of the facts, as disclosed by the evidence in this case, is entirely at variance with that expressed in the majority opinion, handed down on the rehearing. I shall not, however, discuss the differences, in detail, but will merely point out one or two instances in which it appears to me that my *d*rethren have misconstrued the evidence and have failed to appreciate the situation as it existed at the Hamberg yard on the morning of August 26, 1908.

It is said in the opinion mentioned (after referring to certain of the testimony);

"The question suggests itself; Why make up a train, with two cars of lime (after the high water warning), in the lowest part of defendants' yard? This witness (Southall) "further swore that he never had seen the water as high, except in 1888, so that, according to this testimony the rise was not entirely unprecedented."

The uncontradicted testimony is, that, on August 25, the Weather Bureau forecasted a stage of 33 feet of water within the next 24 hours, and that, with all the sources of information at its command, it found no reason to change that forecast, or, did not do so, until after 10.30 o'clock on the morning of the 26th. It is beyond dispute that, with 33 feet of water on the gauge at Augusta, the tracks and cars in the Hamberg yards would have remained perfectly dry, and I infer that they were dry at 6 o'clock on the morning of the 26th, since Skyes testifies that they were dry when he received the cars in question, at 1 o'clock, on that morninng, and, in testifying
157 that he went to his breakfast at 6 o'clock, he leaves the impression that, up to that time, there had been no change in that respect. The water rose into the yard, as I understand the testimony, about 7 o'clock, and, for volume and suddenness, exceeded anything that had ever been known. Mr. Southall, the witness referred to in the opinion on rehearing, does not, in his testimony, except the high water of 1888. He says:

"I have lived in Augusta for 15 years and I have never seen the Savannah river near as high as it was in August 1908. The rise came very suddenly and unexpectedly and engulfed the City of Augusta and the Southern Railway yard in Hamberg."

And the testimony of Mr. Southall is, substantially, corroborated by every witness who testified in the case, with the exception of the

single witness called by plaintiff, who merely identified the bills of lading sued on. So that, if human testimony, given by some twenty men (most of them having no connection with the defendants), with reference to a prenomenon of which they were eye witnesses, is worth anything at all, the Savannah river flood of Aug. 26th, was unprecedented, and was unexpected, not only to the defendants, but to every one who was within reach of it, including the people of the City of Augusta, many of whom lost their property and some of whom lost their lives. I am unable, therefore, to understand to what "higher water warning," my brethren of the majority refer, since after the forecast of the 25th, which, in effect, notified defendants that their yard would be safe for the next 24 hours, the Weather Bureau issued no warning, until it was too late to be of service to defendants, and the fact that the flood came unexpectedly to every one shows that no one had warning of its approach. If defendants had known that the train containing the rice and lime cars was to be submerged, they would no doubt have placed it somewhere else, but, not being possessed of that knowledge, and placing the train where they did, the fact that it contained two cars of lime
158 is not shown to have been negligent railroading; and no such suggestion was made, even in the argument. And, so, it may be said about the position of the train in the yard. I have been unable to find any evidence in the record upon which to base the inference that it was the lowest place in the yard; but, if it were, the defendants had no more reason to expect that the lowest place would be covered by water than the highest, since there was no warning to that effect, and, save, perhaps, the high water of 1888, no precedent. It is said in the opinion on rehearing:

"One bill of lading was dated Aug. 22, 1908, and the other, Aug. 24, 1908. The cause of the delay of these cars in Augusta is not explained."

The bills were dated at New Orleans, whence the rice was shipped; and the cars are shown to have been received by defendant (the Southern R. Co.) on August 25, and sent across the river that night. There is no complaint of delay, so far as I am informed, and no evidence or intimation that the time consumed in handling the cars was unusual or was more than was needed.

Another passage in the opinion on rehearing reads:

"One of the reasons given for not going to the cars on fire, the day previous, was that they had no boat, and waited for a boat to come in hailing distance in order to cross over to the Old Hamberg yard. It seems no boat came on the 26th. It does appear that near a city a boat might have been gotten on the first day. We do not infer that they were cut off entirely from the city where there were boats."

As the only testimony in the record, on the subject of boats, is positive that a boat was obtained as soon as it could be obtained, it does not appear to me that there is much room for an inference. On the other hand, while my brethren draw the inference
159 that a boat can readily be obtained in a city which had suddenly been inundated, the accounts which have recently been

given of the flooded cities of Ohio, Indiana and other states, indicate that they are not obtainable, for love or money, under such conditions and that, not only property, but, lives are lost for lack of them.

In the opinion originally handed down it was said:

"It being established, beyond controversy, that the proximate cause of the loss complained of was an unprecedented flood, which, standing alone, is a sufficient defence to this action, we are of opinion that the burden of proof rested upon the plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise, by defendant, of reasonable care and skill."

In the opinion, on rehearing, it is said:

"According to (the law) and jurisprudence of this state, to be relieved from liability, the carrier must prove that the loss or damage has been occasioned by an accidental or uncontrollable event, and this involves the proposition that the carrier must prove that it was free from fault."

From the paragraph thus quoted, and from the opinion on rehearing, taken as a whole, I infer that the majority of the court now question the correctness of the proposition above quoted from the original opinion, and I shall venture to add a few words upon that issue.

The petition whereby plaintiff comes into court contains the allegations: "And petitioner further avers that section 7 of the act of Congress of June 29, 1906, amending Section 20 of the act of Congress of February 4th, 1887, provides:

"That any common carrier, railroad or transportation company, receiving property for transportation from a point in one state to a point in another state, shall issue a receipt or a bill of lading therefor and shall be liable to the lawful holders thereof for any
160 loss, damage, or injury to such property, caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

"Petitioner further alleges that the New Orleans and Northeastern Railroad Company is, therefore, liable to it, jointly and in solido with the Southern Railway, for its loss and damage resulting from the destruction of its said rice."

The paragraph, thus quoted, is the main feature of what is known as the "Carmack Amendment"—the concluding paragraph of which gives to the initial carrier the right, when, itself, condemned, to recover from the connecting carrier on whose line the loss occurred; and, the fact that plaintiff came into court invoking it, considered in connection with the law itself and with the jurisprudence of the Supreme Court of the United States, interpreting it, leave no room for doubt that this case is governed by that law.

In the recently decided case of Adams Express Co., vs. Croninger, 226 U. S. 148, the Supreme Court of the U. S. has held (quoting from the syllabus.)

"Rights and remedies conferred by existing state laws, where a " a shipment, accepted by a carrier for interstate transportation, has " been lost, injured, or damaged, were not continued in force by " the proviso in the "Carmack Amendment of June 29th, 1906 to " the act of February 4th, 1887, Sec. 20, that nothing therein con- " tained shall deprive the holder of the receipt or bill of lading of " any remedy or right of action which he has under existing law; " such proviso only preserves to such holder any right or remedy " which he may have under the existing Federal law at the
161 " time of his action. * * *

" The intent of Congress to take possession of the subject " of the liability of a carrier under contracts for interstate shipment, " and to supersede all State regulations with reference to that sub- " ject, so clearly appears from the Carmack Amendment of June " 29th, 1906, Sec. 20, as to invalidate, as applied to interstate ship- " ments, the provisions of any State law nullifying contracts limit- " ing the liability of a carrier for loss or damage to the agreed or de- " clared value."

In the body of the opinion is the following:

"Under the law of Kentucky this contract, limiting the plaintiff's " recovery to the agreed or declared value, was invalid, and the ship- " per was entitled to recover the actual value, "unless" as said in " Adams Express Co. vs. Walker, 119 Ky. 121; 67 L. R. A. 412; " 83 S. W. 106, and affirmed in Southern Express Co., vs. Foxen " & Logan, 131 Ky., 257; 133 Am. State Rep. 241; 115 S. W. 184; " 117 S. W. 270, "sufficient facts are shown, independently of the " special contract, to avoid the contract for fraud, or to create an " estoppel at common law."

" The question upon which this case must turn is whether the " operation and effect of the contract for an interstate shipment, as " shown by the receipt or bill of lading, is governed by the local law " of the state or by the act of congress regulating interstate com- " merce" (P. 149).

* * * * * * *

"Prior to that amendment, the rule of carrier's liability, for an " interstate shipment of property, as enforced in both Federal and " State courts, was, either that of the general common law, as
162 " declared by this court and enforced in the Federal Courts " throughout the United States (Hart vs. Pa. R. R. 112 U. S. " 331; 28 Law Ed. 717; 5 Sup. Court Rep. 151), or that deter- " mined by the supposed public policy of a particular state (Penn. " R. Co. vs. Hughes, 191 U. S. 477; 48 Law Ed. 268; 24 Sup. Ct. " Rep. 132), or that prescribed by statute law of a particular State " (Chicago M. & St. P. R. R. Co. vs. Solan, 169 U. S. 133; 42 Law " Ed. 688; 18 Sup. Ct. Rep. 289)."

" Neither uniformity of obligation nor of liability was possible " until Congress should deal with the subject. The situation was

"well depicted by the Supreme Court of Georgia in Southern P. "Co. vs. Grenshaw Bros. 5 Ga. App. 675; 63 S. E. 865, where that "Court said:

"Some States allowed carriers to exempt themselves from all or "a part of the common law liability by rule, regulation, or contract, "others did not. The Federal Courts, sitting in the various States, "were following the local rule, a carrier being held liable, in one "Court when, under the same state of facts, he would be exempt "from liability in another. Hence, this branch of interstate com-"merce was being subjected to such a diversity of legislative and "judicial holding that it was practically impossible for a shipper "engaged in a business that extended beyond the confines of his "own state, or a carrier whose lines were extensive, to know, without "considerable investigation and trouble, and even then oftentimes "with but little certainty, what would be the carrier's actual re-"sponsibility as to goods delivered to it for transportation from one "state to another. The congressional action has made an "end to this diversity, for the national law is paramount and super-
"sedes all state laws as to the rights and liabilities and ex-
163 "emptions created by such transactions. This was doubtless
"the purpose of the law, and this purpose will be effectuated "and not impaired or destroyed, by the State Court's obeying and "enforcing the provisions of the Federal Statute where applicable to "the facts in such cases as shall come before them."

"That the legislation supersedes all the regulations and policies "of a particular state upon the same subject results from its general "character. It embraces the subject of the liability of the carrier "under a bill of lading, which he must issue, and limits his power "to exempt himself by rule, regulation, or contract. Almost every "detail of the subject is covered so completely that there can be "no rational doubt but that Congress intended to take possession "of the subject and superseded all State regulation with reference "to it. Only the silence of Congress authorized the exercise of the "police power of the State upon the subject of such contracts. But, "when Congress acted in such a way as to manifest a purpose to "exercise its conceded authority, the regulating power of the State "ceased to exist. Northern Pa. R. R. Co. vs. Washington, 222 "U. S. 370; 56 Law Ed. 237, 32 Sup. Ct. Rep. 160; Southern R. R. "Co. vs. Reid, 222 U. S. 424, 56 Law Ed. 257; 32 Sup. Ct. Rep. "140; Second Employers Liability cases (Mondoe vs. New York, "N. H. & H. R. Co.) 223 U. S. 1; 56 L. Ed. 327; 38 L. R. A. "(N. S.) 44; 32 Sup. Ct. Rep. 169.

"To hold that the liability therein declared may be increased "or diminished by local regulation or local views of public policy "will either make the provision less than supreme or indicate that "Congress has not shown a purpose to take possession of the subject.

"The first would be unthinkable, and the latter would be to
164 "revert to the uncertainties and diversities of rulings which
"led to the amendment. The duty to issue a bill of lading, "and the liability thereby assumed, are covered in full; and, though "there is no reference to the effect upon state regulation, it is evi-

"dent that Congress intended to adopt a uniform rule and relieve "such contracts from the diverse regulation to which they had "been theretofore subject."

"What is the liability imposed upon the carrier? It is a liability "to any holder of the bill of lading, which the primary carrier "is required to issue, "for any loss, damage or injury to such prop- "erty caused by it, or by any connecting carrier to whom the goods "are delivered. The suggestion that an absolute liability exists "for every loss, damage or injury, from any and every cause, would "be to make such a carrier an absolute insurer, and liable for un- "avoidable loss or damage, though due to uncontrollable forces. "That this was the intent of Congress is not conceivable. To give "such emphasis to the words, "any loss or damage," would be to "ignore the qualifying words, "caused by it." The liability thus "imposed is limited to "any loss, injury or damage caused by it or "a succeeding carrier to whom the property may be delivered;" and "plainly implies a liability for some default in its common law "duty as a common carrier." p. 152.

The rights and liabilities of the parties to this suit are, therefore, to be determined according to the jurisprudence of the Federal Courts, at the time the suit was brought. The question, then, is, does that jurisprudence sustain the proposition, as stated in the syllabus of the original opinion herein, that, "Where in an action "to recover the value of goods entrusted to a carrier and destroyed
"in transit, it is shown that the proximate cause of the loss
165 "was an unprecedented flood, the burden of proof rests upon
"the plaintiff to show that, the flood notwithstanding, the loss "could have been averted, by the exercise, by the carrier, of reason- "able care and skill?"

In Memphis vs. Reese, 10 Wall 176 (77 U. S. 176) it was said:

"When a common carrier shows that a loss was caused by some "vis major, as by a flood, he is excused, without proving affirmatively "that he was guilty of no negligence. The proof of such negli- "gence, if the negligence is asserted to exist, rests on the other "party, in case of a loss of which the proximate cause is the act of "God or the public enemy, the common carrier is excused, though "his own negligence or laches may have contributed as a remote "cause."

The facts of the case thus cited were, that a shipment of tobacco was delayed through the negligence of the carrier; that, while so delayed, rocks fell upon the track from Lookout Mountain, necessitating the holding of the cars at Chattanooga; that, whilst they were so held, the tobacco was destroyed by a freshet in the Tennessee River.

In the case of "The Startle," 115 Fed. 560, it was said:

"The same may be said of the contention, that the tow should "have stopped at Mahon's ditch and waited for the next morning's "tide. Even if it could be said that it was gross carelessness not "to have so stopped, it does not appear that this fact had any direct "casual relation to the breaking away of the boats, and their loss,

" after the anchoring of the tow the same night. In this
166 " case, as in that of the stoppage at Cohansey, an intervening
" cause or causes render this negligence too remote for judi-
" cial consideration. There are always many antecedents to a given
" catastrophe but for the existence of which, the result inquired about
" would not have occurred; it is, however, only the direct and im-
" mediate cause, under the control of human agency, which can be
" judicially considered."

The doctrine thus announced has been applied in the following cases:

" Nashville, etc., Ry. vs. Stone, 112 Tenn. 371; 79 S. W. 1036,
" Hunter vs. Ricke, 127 Iowa, 111; 102 N. W. 827 (where a horse in charge of a liveryman was burned in a fire); Jones vs. Minneapolis Ry. Co. 91 Minn. 231; 97 N. W. 893, (holding that where a cattle train was caught in a blizzard and the cattle frozen, carrier not liable.)"

Cited and principle followed in Union Ins. Co. vs. Shaw, 2 Dill. 23 F. C. 14, 366; holding owner of cargo destroyed by fire failed to prove affirmatively that carrier was negligent; Lamb vs. Camden etc. Trans. Co. 46 N. Y. 279; 7 Am. Rep. 330; holding carrier exempted from liability for loss by fire, not liable unless negligence affirmatively shown; Witting vs. St. Louis, etc. Ry. Co., 101 Mo.
639; 20 Am. St. Rep. 640; 14 S. W. 745; 10 L. R. A., 604,
167 holding burden of proof of carrier's negligence shipping soda fountain at owner's risk of breakage; Turner vs. Haar, 114 Missouri, 347; 21 S. W. 739; holding evidence that building fell because of violent storm cast on plaintiff burden of proving owner's negligence; American Brewing Ass'n vs. Talbot, 141 Mo. 681; 64 Am. St. Rep. 541; 42 S. W. 681; holding plaintiff, storing malt in warehouse damaged by flood, had burden of proving warehouseman negligent; Gellespie vs. St. L. etc. Ry. Co. 6 Mo. App. 558; holding injured passengers had burden of proof as to carrier's negligence in accident, caused by rails caving in after an unusual rain storm; Witting vs. St. L. etc. Ry. Co., 28 Mo. App. 11; holding a shipper of marble at owner's risk of breakage, had burden of affirmatively proving carrier's negligence; Ry. Co. vs. Manchester Mills, 88 Ten. 661; 14 S. W. 316; holding carrier exempted from liability for loss by fire, not liable in absence of affirmative proof of negligence; Schaller vs. Chicago &c. Ry. Co., 97 Wis. 39; 71 S. W. 1044; holding carrier exempted by bill of lading, not liable for loss by fire where negligence not proven."

In Washburn Crosby Co. vs. William Johnston Co., Ltd., 125 Fed 273, it was held:

"Where bills of lading exempted the carrier from liability for loss " or damage to the goods, while on wharf awaiting shipment, by fire " or flood, not happening through the fault or negligence of the " carrier, to entitle the shipper to recover for such a loss he has " burden of proving that it occurred through the carrier's fault or " negligence."

"A clause in a bill of lading providing that merchandise on wharf, " awaiting shipment or delivery, shall be at shipper's risk of loss or

"damage, by fire or flood, must be given the meaning the
168 "language plainly expresses, and is applicable where the
"goods were burned after being placed on the wharf, but
"before shipment."

The Carmack Amendment, provides:

"That the carrier shall be liable for any loss, damage or injury to "such property caused by it or by any common carrier, railroad or "transportation company to which the said property may be de- "livered."

In Adams Express Co. vs. Croninger supra, the Supreme Court, considering the paragraph last above quoted, said:

"The suggestion that an absolute liability exists for every loss, "damage or injury from any and every cause, would be to make "such a carrier an absolute insurer and liable for unavoidable loss "or damage though due to uncontrollable forces. That this was the "intent of Congress is not conceivable. To give such emphasis to "the words "any loss or damage" would be to ignore the qualifying "words "caused by it." The liability thus imposed is limited to "any loss, injury or damage caused by it or a succeeding carrier "to whom the property may be delivered." And plainly implies a "liability for some default in its common law duty as a common "carrier."

In Kirk vs. Folsom, 23 A. 584, it was held (quoting syllabus):

"If goods which have been shipped in good order have been lost "on the voyage it devolves on the carrier to show that the loss was "occasioned by accidental and uncontrollable events, which, if estab- "lished, the burden is then shifted on the shipper, before he can "hold the carrier liable, of showing that the accident to the boat by "which the goods were lost occurred through the fault of the "carrier."

Citing 10 An. 413; 12 Howard, 272.

169 In Kelhem vs. Kensington, 24 A. 100, it was "held, that, it "being shown by the bill of lading that any damage done to "the cargo or any portion thereof from accident of machinery, "boilers or dangers of the seas of any kind were excepted, and the "damage in this case was caused by a storm at sea, that it was there- "fore incumbent on the plaintiffs to show affirmatively, to enable "them to recover, that the damage was caused by the fault of the "carriers." (Citing) 10 Wallace, 176, Memphis vs. Reeves, 12 Howard, 272, Clark vs. Bonwell, 12 Howard, 352, Rich vs. Lambert, 17 An. 9, Litchford vs. The Golden Eagle, 23 An. 584; Kirk vs. Folsom, 23 A. 584.

On the question of "proximate cause," the following authorities are pertinent:

Empire State Cattle Co. vs. A. T. and S. *T.* R. Co. 135 Fed. 135.

"A carrier is not liable for a loss of property in shipment through "an act of God which could not reasonably have been foreseen, al- "though but for its previous negligence, by which the shipment was "delayed, the property would have escaped the danger, and the loss "would not have occurred; in such case the negligence is not the "proximate cause of the injury."

Chicago &c. R. R. Co. vs. Elliott, 55 Fed. 949.

"Where a contract for a through shipment of stock by a railroad " did not specify the lines over which the shipment should be made, " but the stock was routed by the initial carrier over certain lines, " it was not negligence for an intermediate carrier to divert the ship- " ment to a different line, where owing to floods it could not be " delivered to or taken by the next connecting carrier, and where " no danger of loss or injury by reason of the diversion could reason- " ably have been anticipated."

170 T. & P. Railway Co. vs. Couturie, 135 Fed. 475.

"The fifth request to charge, which was refused, is as fol- " lows: If the jury find there was any delay in forwarding the cotton " from Westwego by reason of the negligence of the defendant rail- " way company, or by reason of the failure of the ocean carriers to " send for and take away the cotton as it was received at Westwego, " and that, but for the defendant's negligence in failing to forward " the cotton from Westwego, or the ocean carrier's failure to receive " and take it away, it would not have been in the cars or under the " sheds at the time the fire occurred, such negligent delay in for- " warding would not make the defendant liable in this case, for the " reason that such negligent delay would, in law, be the remote and " not the direct and proximate, cause of the destruction of the " cotton."

"We think defendant was entitled to this charge. It states the " law as laid down by the Supreme Court of the United States in " Railroad Co. vs. Reeves, 10 Wall., 176; 19 Law Ed. 909, and in- " asmuch as the jury might, on the evidence, have found negligent " delay, without instructions that such delay was not the proximate " cause, they might have been misled into rendering a verdict for " plaintiff on the ground of delay. The question is whether this " request was practically covered by the charge of the Court."

St. Louis &c. R. Co. vs. Commercial Ins. Co., 139 U. S. 237. See also 198 U. S. 350.

"The delay of the defendant railroad company to furnish trans- " portation according to its contract with the compress company was " in no legal sense a cause of the destruction of the cotton. It was " simply one of a series of antecedent events without which the loss " could not have happened, for if the cotton had not been

171 " there, it would not have been burned. The cause of the " loss was the fire, kindled by some unknown means, and in " no way arising from or connected with the neglect of the defend- " ant to furnish transportation. Upon principle and authority, that " neglect was not the direct and proximate cause of the loss by fire, " and did not make the defendant responsible for that loss to the " owners of the cotton or to their insurers. Railroad Co. vs. Reeves, " 10 Wall, 176, Morrison vs. Davis, 20 Penn. St. 171, Denny vs. N. " Y. Central R. R., 13 Gray, 481; Hoadley vs. Northern Transporta- " tion Co., 115 Mass. 304; Dubuque Ass'n vs. Dubuque, 30 Iowa, " 176; Daniels vs. Balantine, 23 Ohio St. 531."

The City of Boston, 159 Fed. 266.

" And when the circumstances are those of sudden emergency, the " result is not the criterion by which what was done is to be judged.

"Railroad vs. Reeves, 10 Wall. 176, 19 Law Ed. 909; Holliday vs. "Kennard, 12 Wall. 254; 20 Law Ed. 390; The Styria, 186 U. S. 1, "10 22 Sup. Ct. 731, 46 Law Ed. 1027. The principle is familiar "in maritime cases that error of judgment in an emergency is not "necessarily negligence or fault. It is not contended that the per- "sons in charge were not competent, the owners did not contract for "their infallibility, nor that they should do in an emergency pre- "cisely what after the event others may think would have been best. "Lawrence vs. Minturn, 17 Howard, 100, 110, 15 Law Ed. 58. "These are the general rules by which the conduct of the ferryboat's "crew on this occasion is to be judged."

I have already remarked that the plaintiff in this case called but one witness—who merely identified the bills of lading sued
172 on—and it appears to me, as the other twenty or more witnesses, who were examined on behalf of defendants, testified that the flood in question was not only unprecedented in volume, but, also, in suddenness, and that it was unexpected by every one—including the government officials, whose business it was to foretell its arrival—that the finding of the Court, that defendants were negligent, in not expecting and preparing for it, is based upon a total misconception of what those witnesses intended to convey, and what they did not convey to my mind.

I therefore adhere to the views expressed in the original opinion, and dissent from those expressed in the opinion handed down on rehearing as, also, from the decree predicated thereon.

173 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that the foregoing one hundred and seventy-two (172) pages contain a full, true and complete copy of the proceedings had in the Civil District Court for the Parish of Orleans, in a certain suit wherein National Rice Milling Company was plaintiff, and New Orleans & Northeastern Railroad Company and Southern Railway, were defendants; and, also, of all the proceedings had in this Supreme Court on the appeal taken by said defendants, which appeal is now on the files thereof, under No. 18,579.

In testimony whereof I have hereunto set my hand, and affixed the seal of said Court, at the City of New Orleans, this the 21st day of May, Anno Domini, one thousand, nine hundred and thirteen.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

174 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Joseph A. Breaux, Chief. Justice of the Supreme Court of the State of Louisiana, do hereby certify that Paul E. Mortimer is Clerk of the Supreme Court of the State of Louisiana; that the signature of Paul E. Mortimer to the foregoing certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal, at the city of New Orleans, this the 21st of May, Anno Domini, one thousand, nine hundred and thirteen.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice Supreme Court of Louisiana.

175 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana hereby certify that the Supreme Court of the State of Louisiana is the highest Court of law in Louisiana, and that the Honorable Joseph A. Breaux is the Chief Justice of said Court and that his signature to the above certificate is genuine.

In witness whereof I hereunto set my hand and the seal of the Court aforesaid, at the city of New Orleans, this the 21st day of May, Anno Domini, one thousand, nine hundred and thirteen.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

176 In the Supreme Court of Louisiana, —— Term, 1913.

No. 18579.

NATIONAL RICE MILLING COMPANY, Plaintiff,
vs.
NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY, Defendants.

Petition for Writ of Error.

To the Honorable the Chief Justice of the Supreme Court of the State of Louisiana:

The petition of the New Orleans & Northeastern Railroad Company, a corporation organized under the Laws of the State of Louisiana, and of the Southern Railway Company, a corporation organized under the Laws of the State of Virginia, defendants above named, respectfully shows:

That on the 14th day of April 1913, the Supreme Court of the State of Louisiana, which is the highest court in that State in which a decision in the action referred to herein could be had, rendered against petitioners a final judgment in a certain case numbered 18579 of the docket of the said Court, wherein your Petitioners were each defendants, and the National Rice Milling Company, a corporation organized under the Laws of the State of Louisiana, was the plaintiff, and rejected the demand of the defendants, for dismissal of the said suit of the National Rice Milling Company, which demand of petitioners rested upon the contention that the contract of interstate carriage sued on was to be governed, under the Constitution of the United States by the Interstate Commerce Act, being the Act of Congress of February 4th, 1887, and the Acts
177 amendatory thereof, more especially the provisions of Section 7 of the Act of June 29th, 1906, amending Section 20 of the Interstate Commerce Act, known as the Carmack Amendment and that under the said Acts of Congress and the construction placed thereon, and on the interstate contracts of affreightment by the Supreme Court of the United States and the other Federal Tribunals, petitioners were entitled to immunity from liability herein, the suit having been brought and the questions raised arising under the Constitution of the United States and the aforesaid Acts of Congress.

That in said action there was drawn in question by your petitioners the validity as applied to this case of the Statutes of the State of Louisiana on the ground of repugnancy to the Constitution and Laws of the United States, and the decision of the highest court of the State of Louisiana was in favor of their validity and in said action, a right, privilege and immunity was specially set up and claimed by your Petitioners under the Constitution and under the Statutes of the United States, and the decision of the Supreme Court of Louisiana was against the right, privilege and immunity so set up and claimed; all of which will more fully and in detail appear from the assignment of errors filed herein.

Wherefore, and in as much as your Petitioners feel aggrieved by the final decision of the Supreme Court of Louisiana in rendering judgment against them and each of them in this action, they respectfully pray that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of Louisiana for the correcting of the errors complained of; that the National Rice Milling Company be cited accordingly; that an order may be entered fixing the amount of the supersedeas bond herein; that a duly authenticated Transcript of the record and proceedings herein in the said Supreme Court of Louisiana may be sent to the Supreme Court of the United States; and that the decision and judg-
178 ment of the Supreme Court of Louisiana herein may be reversed and annulled.

JOHN K. GRAVES,
By J. BELL,
J. BLANC MONROE,
MONTE M. LEMANN,

Attorneys for New Orleans and Northeastern Railroad Company and Southern Railway Company, Petitioners.

STATE OF LOUISIANA,
Supreme Court, To-wit:

Let the writ of error above prayed for issue upon the execution of a bond by the New Orleans and Northeastern Railroad Company and Southern Railway Company, payable to National Rice Milling Company, in the sum of Three Thousand Dollars, such bond when approved to act as a supersedeas. May 10, 1913.

JOS. A. BREAUX,
Chief Justice of the Supreme Court of Louisiana.

Service accepted. Citation waived. All other rights reserved.

GUSTAVE LEMLE,
W. CASTESBY JONES,
ARTHUR A. MORENO,
Att'ys for Plaintiff & Defendant in Error.

178½ [Endorsed:] No. 18579. Supreme Court of *Court* Louisiana, Div. —. National Rice Milling Company, Plaintiff, vs. New Orleans & Northeastern Railroad Company and Southern Railway Company, Defendants. Petition for writ of error. Filed May 10, 1913. Paul E. Mortimer, Clerk. Hall, Monroe & Lemann, Attorneys, 1103-4-5 Hibernia Bank Building, New Orleans.

179 Supreme Court of the State of Louisiana.

NATIONAL RICE MILLING COMPANY, Plaintiff,
vs.
NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY, Defendants.

Assignment of Errors for the Supreme Court of the United States.

This was an action instituted by the Plaintiff, National Rice Milling Company, upon a bill of lading issued to it by the defendant, New Orleans and Northeastern Railroad Company, at New Orleans, Louisiana, on or about August 21st, 1908, under which a carload of rice was consigned and received for transportation to Charleston, South Carolina, and upon a bill of lading issued to Plaintiff, at New Orleans, Louisiana, by the defendant, New Orleans and Northeastern Railroad Company, on or about August 22nd, 1908, for the consignment and transportation of a car load of rice to Charleston, South Carolina. In said action the Plaintiff sought a judgment against the defendants for the loss and destruction of said two carloads of rice at Hamburg, South Carolina, while in transit under said bills of lading in the possession of the defendant, Southern Railway Company, said destruction being by fire resulting from the action of flood waters upon cars of lime standing near the cars which contained said rice, and plaintiff in its petition set forth and relied upon those provisions of Section 7 of the Act of Congress of June 29th, 1906, which are known as the Carmack Amendment,

being the last two paragraphs of Section 20 of the Act to Regulate Commerce, as amended.

180 New Orleans and Northeastern Railroad Company and Southern Railway Company, defendants in the Court below and plaintiffs in error in the Supreme Court of the United States, respectfully assign as errors in the record of proceedings in this cause in the Supreme Court of Louisiana, the following:

1. The Supreme Court of the State of Louisiana erred in failing to hold that in the suit, expressly brought under those of the provisions of Section 7 of the Act of Congress of June 29th, 1906, amending Section 20 of the Act of Congress of February 4th, 1887, as amended, which are known as the Carmack Amendment, and expressly brought upon interstate bills of lading, the defendants were entitled under Article 1, Section 8, Clause 3 of the United States Constitution and the Act of Congress enacted in pursuance thereof to certain rights, privileges and immunities, namely, to have their liability determined according to the provisions of said Carmack Amendment and the rules of the common law obtaining in the Federal courts inhering in and preserved to defendants by virtue of said Carmack Amendment as validily modified by the provisions of said bills of lading, and to the privilege and immunity of freedom from having their rights, obligations and liabilities under said bills of lading controlled or affected by the statutes, law, jurisprudence or public policy of the State of Louisiana. And plaintiffs in error duly set up and specially claimed the benefit and protection of said provisions of the Constitution and statutes of the United States.

2. The Supreme Court of Louisiana erred in aplying in this cause, and fixing the liability of plaintiffs in error upon the basis of, the statutes, law, jurisprudence and public policy of the State of Louisiana, thus denying to plaintiffs in error the benefit and protection of the Commerce Clause of the Federal Constitution and the provisions of the Act to Regulate Commerce enacted in pursuance

181 thereof, the benefit and protection of which the plaintiffs in error duly set up and specially claimed.

3. The Supreme Court of Louisiana erred in failing to find that by the enactment by Congress of the provisions relating to the subject matter of the liability of interstate carriers upon interstate contracts of affreightment, all state legislation, jurisprudence and public policy bearing upon said subject matter was suspended, abrogated and annulled, thus denying to plaintiffs in error the benefit and protection of the Commerce Clause of the Federal Constitution and of the Act to Regulate Commerce, as amended, more especially section 20 thereof, the benefit and protection of which was duly set up and specially claimed in this proceeding.

4. The Supreme Court of Louisiana erred in failing to hold that when plaintiffs in error had shown that the proximate cause of the loss and destruction of said shipments was an act of God, the burden of proof was then upon defendant in error to show that notwithstanding said act of God the plaintiffs in error could with due care have preserved the shipments, thus denying to plaintiffs in error the

benefit and protection of the Commerce Clause of the Federal Constitution and of the Act to Regulate Commerce, as amended, more especially section 20 thereof, the benefit and protection of which was duly set up and specially claimed in this proceeding.

5. The Supreme Court of Louisiana erred in holding, contrary to the provisions of the Carmack Amendment (the benefit and protection of which was duly set up and specially claimed), which conferred upon plaintiffs in error the right to have their obligations and liability under said bills of lading determined according to its provisions and to the rules of common law obtaining in the Federal Courts inhering in said act of Congress and made binding by virtue thereof upon State courts, that the burden of proof was upon plaintiffs in error, notwithstanding proof that the shipments in question
182 were destroyed by the act of God, to show that Plaintiffs in error were not guilty of contributory negligence.

6. The Supreme Court of Louisiana erred in holding that Sections 2219, 2232, 1923, and 2754 of the Code of Louisiana were valid as applied to this case in that said provisions as so applied are attempted regulations of Interstate Commerce in conflict with Article 1, Section 8, Clause 3, of the Constitution of the United States, in that, as thus construed, they seek to invade a field exclusively taken possession of by Congress in the Act to Regulate Commerce, as amended, more especially Section 20 thereof, and plaintiffs in error duly set up and specially claimed the benefit and protection of said constitutional and congressional enactments in this proceeding.

7. The Supreme Court of the State of Louisiana erred in failing and refusing to hold that, as applied to the circumstances of this case, the following stipulation of the bills of lading sued upon by the defendant in error was binding upon it, to-wit:

"Neither this company nor any of its connecting carriers shall be liable for any damages to or destruction of said property by fire, unless such damage or destruction shall result directly and exclusively from their negligence and that of their employés, and unless such negligence shall be affirmatively established by the owner of the said property."

thus denying to plaintiffs in error the benefit and protection of the Carmack Amendment.

8. The Supreme Court of Louisiana erred in disregarding and holding invalid the provisions of the said bills of lading providing that the carrier should not be liable for damage to or destruction of said shipments by fire unless negligence of said carriers or their employés causing such damage or destruction should be affirmatively established by the owner of the property, thus denying to plaintiffs in error the benefit and protection, duly set up and claimed, of the Carmack Amendment, enacted by Congress in pursuance of
183 the Commerce Clause of the Federal Constitution.

9. The Supreme Court of Louisiana erred in holding that the burden was upon the Southern Railway Company, plaintiff in error, to prove all of the following allegations in its answer:

"Respondent avers that this happened without any contributory negligence on its part, and that the sudden and unprecedented flood

which could not have been anticipated, with the resultant fire, was the proximate cause of the destruction of the plaintiff's property. Respondent avers further that the cars were not unreasonably delayed and that nothing could have been done by Respondent which was not done to save the property."

in that under the provisions of the Carmack Amendment construed in the light of the Federal common law inhering therein, after said Plaintiff in error had proved that a sudden and unprecedented flood, which could not have been anticipated, with the resultant fire was the cause of the destruction of the property, the burden was upon the defendant in error to prove that said plaintiff in error failed to do anything that could have been done by said carrier to save the property.

10. The Supreme Court of Louisiana erred in holding and in affirming the judgment of the trial court to the effect that the alleged negligence of the plaintiffs in error or either of them was the proximate cause of the loss and damage, thus denying to plaintiffs in error the benefit and protection of the provisions of the Federal enactment, known as the Carmack Amendment, the benefit and protection of which plaintiffs in error duly set up and specially claimed in this proceeding.

11. The Supreme Court of Louisiana erred in failing to hold that the plaintiffs in error, being interstate carriers of interstate shipments, were liable only for such loss or damage to the shipments in question as was "caused by" them or either of them within the meaning of the quoted words as used in the Carmack Amendment.

12. The Supreme Court of Louisiana erred in holding
184 that under the evidence in this case the plaintiffs in error were not entitled to a reversal of the judgment of the trial court in that under said evidence the loss and destruction of the shipments was not "caused by" the plaintiffs in error or either of them within the meaning of the Carmack Amendment, the benefit and protection of which was specially set up and claimed in this proceeding.

Wherefore for these and other manifest errors appearing in the record, the said New Orleans and Northeastern Railroad Company and Southern Railway Company, plaintiffs in error, pray that the judgment of the said Supreme Court of Louisiana be reversed, set aside and held for naught, and that judgment be rendered for plaintiffs in error, granting them their rights under the Constitution and statutes of the United States, and plaintiffs in error also pray for judgment for their costs.

ALFRED P. THOM,
JOHN K. GRAVES,
J. BLANC MONROE,
MONTE M. LEMANN,
Attorneys for New Orleans & Northeastern Railroad Company and Southern Railway Company.

184½ [Endorsed:] No. 18579. *Court.* Supreme Court of Louisiana, Div. —. National Rice Milling Company, Plain-

tiff, vs. New Orleans & Northeastern Railroad Company and Southern Railway Company, Defendants. Assignment of Errors for the Supreme Court of the United States. Filed May 10, 1913. Paul E. Mortimer, Clerk. Hall, Monroe & Lemann, Attorneys, 1103-4-5 Hibernia Bank Building, New Orleans.

185 *Writ of Error.*

Supreme Court of the United States.

No. —.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY, Plaintiffs-in-Error,
vs.
NATIONAL RICE MILLING COMPANY, Defendant-in-Error.

The President of the United States to the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of Louisiana, Greeting:

Because in the record and proceedings as also in the rendition of judgment of a plea which is in said Court before you between the New Orleans and Northeastern Railroad Company, and the Southern Railway Company, Plaintiffs in Error, and the National Rice Milling Company, Defendant in Error, your Court being the highest Court of said State having jurisdiction to render judgment in the cause, there was drawn in question the right of the said Southern Railway Company and the New Orleans and Northeastern Railroad Company, Plaintiffs in Error, to immunity from liability under the provisions of the Acts of Congress of Feb. 4th, 1887, being the Interstate Commerce Acts as amended by the several Acts of Congress and particularly by the Act of Congress of June 29th, 1906, and those provisions of Section 7 thereof, known as the Carmack Amendment; and

Whereas, the question of the said immunity and of the said Act was discussed in the opinion handed down, and the decision was adverse to the immunity and nonliability claimed under the said Act and there being manifest error in the said decision greatly to the damage of the New Orleans & Northeastern Railroad Company and the Southern Railway Company, petitioners in error, and we being willing that if there is error, it should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, we

186 do therefore command you, if judgment be therein given that under the seal of your Court, you send the record and the proceedings had in this case to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C., on the 9th day of June, 1913, in the Supreme Court to be then and there held that the record may be inspected by the said Court and justice done.

Witness the Hon. E. D. White, Chief Justice of the Supreme Court of the United States, on the 10th day of May, in the year of our Lord Nineteen Hundred and Thirteen.

[Seal U. S. District Court for the Eastern Dist. of La., N. O. Div.]

H. J. CARTER,
Clerk District Court of the United States,
Eastern District of Louisiana.

Allowed:
JOS. A. BREAUX,
Chief Justice of the Supreme Court of Louisiana.

[Seal Supreme Court of the State of Louisiana.]

Service accepted. Citation waived. All other rights reserved.

GUSTAVE LEMLE,
W. CATESBY JONES,
ARTHUR A. MORENO,
Atty's for Plaintiff & Defendant in Error.

May 9th, 1913.

186½ [Endorsed:] No. 18,579. U. S. Supreme Court. New Orleans & Northeastern Railroad Company and Southern Railway Company, Plaintiffs-in-error, vs. National Rice Milling Company, Defendant-in-error. Writ of Error. Filed May 10, 1913. Paul E. Mortimer, clerk. Hall, Monroe & Lemann, Attorneys, 1103-4-5 Hibernia Bank Building, New Orleans.

187 (*Copy of Bond for Writ of Error.*)

Supreme Court of the State of Louisiana.

NATIONAL RICE MILLING COMPANY, Defendant in Error,
vs.
NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY and SOUTHERN RAILWAY COMPANY, Plaintiffs in Error.

Know all men by these presents: That New Orleans & Northeastern Railroad Company and Southern Railway Company, each as principals, each to the extent of Five thousand & 00/100 — and United States Fidelity & Guaranty Company, of Baltimore, Maryland, as surety for each of the said principals, are held and firmly bound unto the National Rice Milling Company in the full sum of ($5,000.00) Five thousand Dollars, to be paid to the National Rice Milling Company, its attorneys, successors, administrators, executors or assigns, to which payment well and truly to be made, we bind ourselves, our successors, assigns, executors and administrators jointly and severally by these presents.

Signed and dated, this 10th day of May, 1913.

Whereas, lately at a regular term of the Supreme Court of the State of Louisiana, sitting in New Orleans, in this State, in a suit pending in said Court between the National Rice Milling Company, as Plaintiff, and the New Orleans and Northeastern Railroad Company, and the Southern Railway Company, as defendants, cause No. 18579 on the law docket of the said Court, a final judgment was rendered against the said New Orleans and Northeastern Railroad Company and the said Southern Railway Company, for
188 the sum of $ Twenty three hundred twenty six 50/100 with interest thereon, at the rate of 5% from November 15, 1910, and the said New Orleans and Northeastern Railroad Company and the said Southern Railway Company, have obtained a writ of error and file a copy thereof, in the Clerk's office of the said Court, to reverse the judgment of the Circuit Court in the aforesaid suit, and citation directed to the National Rice Milling Company, Defendant in error, citing it to appear before the Supreme Court of the United States, to be holden at Washington, D. C., according to law, within thirty days from the date hereof.

Now, the condition of the above obligation is such that if the said New Orleans and Northeastern Railroad Company, and the said Southern Railway Company shall each prosecute its writ of error to effect and answer all damages and costs, if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY,
(Sg.) By HALL, MONROE & LEMANN,
J. BLANC MONROE,
Attorneys of Record.
SOUTHERN RAILWAY COMPANY,
(Sg.) By HALL, MONROE & LEMANN,
J. BLANC MONROE,
Attorneys of Record.
UNITED STATES FIDELITY & GUARANTY CO.,
By WILLIAM H. KLINESMITH,
Its Attorney in Fact. [SEAL.]

Approved this 10 day of May, 1913, and to operate as supersedeas.

[Seal Supreme Court of the State of Louisiana.]

(Signed) JOS. A. BREAUX,
Chief Justice Supreme Court of Louisiana.

188½ (Endorsed:) No. 18,579. Supreme Court of Louisiana. Div. —. National Rice Milling Co., Defendant in Error, vs. New Orleans & Northeastern Railroad Company and Southern Railway Company, Plaintiffs in Error. Bond. Filed May 10, 1913. (Signed) Paul E. Mortimer, clerk. Hall, Monroe & Lemann, Attorneys, 1103-4-5 Hibernia Bank Building, New Orleans.

189 *Certificate of Lodgment.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that there was lodged with me as such clerk, on May 10th, 1913, in the matter of New Orleans and Northeastern Railroad Company and Southern Railway Company, Plaintiffs-in-Error vs. National Rice Milling Company, Defendant-in-Error, No. 18,579:—

First. The original petition for writ of error, as herein set forth, and order granting writ.

Second. The original assignment of errors, as herein set forth.

Third. The original writ of error, as herein set forth, showing acceptance of service & Waiver of citation by defendant-in-error.

Fourth. Copy of writ of error lodged in this office and on file.

Fifth. Bond for writ of error, a copy of which is herein set forth.

In witness whereof I hereunto set my hand and affix the seal of the said Court, at the city of New Orleans, this the 21st of May, A. D. 1913.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

190 *Return to Writ.*

UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Louisiana, in the City of New Orleans, this 21st day of May, 1913.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

Endorsed on cover: File No. 23,766. Louisiana Supreme Court. Term No. 615. New Orleans and Northeastern Railroad Company and Southern Railway Company, Plaintiffs in Error, vs. National Rice Milling Company. Filed June 26, 1913. File No. 23,766.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 615.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

NATIONAL RICE MILLING COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF LOUISIANA.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement of the Case.

This is a civil action which was instituted in the Civil District Court for the Parish of Orleans, Louisiana, by defendant in error, National Rice Milling Company, a New Jersey corporation doing business in Louisiana, upon bills of lading issued to it by plaintiff in error, New Orleans & North-

eastern Railroad Company, in August, 1908, under which two carloads of rice were received for transportation and consigned to Charleston, South Carolina. Defendant in error in this proceeding sought to recover damages from defendants, New Orleans & Northeastern Railroad Company and Southern Railway Company, plaintiffs in error here, for the loss and destruction of said two carloads of rice at Hamburg, South Carolina, while in transit under said bills of lading and in possession of Southern Railway Company, said loss and destruction having been caused by fire resulting from the action of flood waters upon the contents of cars containing lime which stood in the railroad yards at Hamburg near the cars of rice (Trans., pp. 53, 85).

Defendant in error in its petition in said Civil District Court set forth and based its asserted cause of action upon those provisions of section 7 of the act of Congress of June 29, 1906, which are known as the Carmack Amendment, being the last two paragraphs of section 20 of the Act to Regulate Commerce, as amended (Trans., p. 3).

The decision of the court of first instance was against the defendant carriers (Trans., p. 57), who appealed to the Supreme Court of the State. Argument was had in that tribunal at some length, but the court, finding itself not prepared to decide the case, invited additional oral argument which was had (Trans., p. 61). Thereafter the decision of the lower court was reversed and judgment ren-

dered in favor of the carriers (Trans., p. 62). Plaintiff (defendant in error here) applied for a rehearing which was granted (Trans., p. 82), and for a third time the case was orally argued in the Supreme Court of Louisiana. Thereafter, that tribunal reversed its original judgment and held the defendant carriers liable (Trans., p. 83). The defendant carriers have brought the case here by writ of error. Defendant in error filed a motion to dismiss or affirm which was denied by this court, and the case is now here for hearing upon twelve assignments of error (Trans., p. 112) as follows:

ASSIGNMENT OF ERRORS.

1. The Supreme Court of the State of Louisiana erred in failing to hold that in this suit, expressly brought under those of the provisions of section 7 of the act of Congress of June 29, 1906, amending section 20 of the act of Congress of February 4, 1887, as amended, which are known as the Carmack Amendment, and expressly brought upon interstate bills of lading, the defendants were entitled under article 1, section 8, clause 3 of the United States Constitution and the act of Congress enacted in pursuance thereof to certain rights, privileges and immunities, namely, to have their liability determined according to the provisions of said Carmack Amendment and the rules of the common law obtaining in the federal courts inhering in and preserved to defendants by virtue of said Carmack Amendment as validly modified by the provisions of said bills of lading, and to the privilege and immunity of freedom from having their rights, obligations and liabilities under said

bills of lading controlled or affected by the statutes, law, jurisprudence or public policy of the State of Louisiana. And plaintiffs in error duly set up and specially claimed the benefit and protection of said provisions of the Constitution and statutes of the United States.

2. The Supreme Court of Louisiana erred in applying in this cause, and fixing the liability of plaintiffs in error upon the basis of, the statutes, law, jurisprudence and public policy of the State of Louisiana, thus denying to plaintiffs in error the benefit and protection of the Commerce Clause of the Federal Constitution and the provisions of the Act to Regulate Commerce enacted in pursuance thereof, the benefit and protection of which the plaintiffs in error duly set up and specially claimed.

3. The Supreme Court of Louisiana erred in failing to find that by the enactment by Congress of the provisions relating to the subject-matter of the liability of interstate carriers upon interstate contracts of affreightment, all state legislation, jurisprudence and public policy bearing upon said subject-matter was suspended, abrogated and annulled, thus denying to plaintiffs in error the benefit and protection of the Commerce Clause of the Federal Constitution and of the Act to Regulate Commerce, as amended, more especially section 20 thereof, the benefit and protection of which was duly set up and specially claimed in this proceeding.

4. The Supreme Court of Louisiana erred in failing to hold that when plaintiffs in error had shown that the proximate cause of the loss and destruction of said shipments was an act of God, the burden of proof was then upon defendant in error to show that notwithstanding said act of God the plaintiffs in error could with due care have preserved the shipments, thus denying to plaintiffs

in error the benefit and protection of the Commerce Clause of the Federal Constitution and of the Act to Regulate Commerce, as amended, more especially section 20 thereof, the benefit and protection of which was duly set up and specially claimed in this proceeding.

5. The Supreme Court of Louisiana erred in holding, contrary to the provisions of the Carmack Amendment (the benefit and protection of which was duly set up and specially claimed) which conferred upon plaintiffs in error the right to have their obligations and liability under said bills of lading determined according to its provisions and to the rules of common law obtaining in the federal courts inhering in said act of Congress and made binding by virtue thereof upon State courts, that the burden of proof was upon plaintiffs in error, notwithstanding proof that the shipments in question were destroyed by the act of God, to show that plaintiffs in error were not guilty of contributory negligence.

6. The Supreme Court of Louisiana erred in holding that sections 2219, 2232, 1923, and 2754 of the Code of Louisiana were valid as applied to this case in that said provisions as so applied are attempted regulations of interstate commerce in conflict with article 1, section 8, clause 3 of the Constitution of the United States in that, as thus construed, they seek to invade a field exclusively taken possession of by Congress in the Act to Regulate Commerce as amended, more especially section 20 thereof, and plaintiffs in error duly set up and specially claimed the benefit and protection of said constitutional and congressional enactments in this proceeding.

7. The Supreme Court of the State of Louisiana erred in failing and refusing to hold that, as applied to the circumstances of this case, the follow-

ing stipulation of the bills of lading sued upon by the defendant in error was binding upon it, to wit:

> "Neither this company nor any of its connecting carriers shall be liable for any damages to or destruction of said property by fire, unless such damage or destruction shall result directly and exclusively from their negligence and that of their employees, and unless such negligence shall be affirmatively established by the owner of the said property,"

thus denying to plaintiffs in error the benefit and protection of the Carmack Amendment.

8. The Supreme Court of Louisiana erred in disregarding and in holding invalid the provisions of the said bills of lading providing that the carrier should not be liable for damage to or destruction of said shipments by fire unless negligence of said carriers or their employees causing such damage or destruction should be affirmatively established by the owner of the property, thus denying to plaintiffs in error the benefit and protection, duly set up and claimed, of the Carmack Amendment, enacted by Congress in pursuance of the Commerce Clause of the Federal Constitution.

9. The Supreme Court of Louisiana erred in holding that the burden was upon Southern Railway Company, plaintiff in error, to prove all of the following allegations in its answer:

> "Respondent avers that this happened without any contributory negligence on its part, and that the sudden and unprecedented flood, which could not have been anticipated, with the resultant fire, was the proximate cause of the destruction of plaintiff's property. Respondent avers further that the cars were not unreasonably delayed and that

nothing could have been done by respondent which was not done to save the property,"

in that under the provisions of the Carmack Amendment, construed in the light of the federal common law inhering therein, after said plaintiff in error had proved that a sudden and unprecedented flood, which could not have been anticipated, with the resultant fire, was the cause of the destruction of the property, the burden was upon the defendant in error to prove that said plaintiff in error failed to do anything that could have been done by said carrier to save the property.

10. The Supreme Court of Louisiana erred in holding and in affirming the judgment of the trial court to the effect that the alleged negligence of the plaintiffs in error or either of them was the proximate cause of the loss and damage, thus denying to plaintiffs in error the benefit and protection of the provisions of the federal enactment known as the Carmack Amendment, the benefit and protection of which plaintiffs in error duly set up and specially claimed in this proceeding.

11. The Supreme Court of Louisiana erred in failing to hold that the plaintiffs in error, being interstate carriers of interstate shipments, were liable only for such loss or damage to the shipments in question as was "caused by" them or either of them within the meaning of the quoted words as used in the Carmack Amendment.

12. The Supreme Court of Louisiana erred in holding that under the evidence in this case the plaintiffs in error were not entitled to a reversal of the judgment of the trial court in that under said evidence the loss and destruction of the shipments was not "caused by" the plaintiffs in error or either of them within the meaning of the Carmack Amendment, the benefit and protection of which was specially set up and claimed in this proceeding.

ARGUMENT.

The assignments of error may be grouped as follows: The first three assignments are general, charging that plaintiffs in error were deprived by the State courts of their right to have their liability tested by the Federal law, and that their liability was by said courts tested by the Louisiana law. Assignments four to nine, inclusive, charge reversible error on the part of the Louisiana courts in denying to plaintiffs in error the protection of the Federal law in the matter of the burden of proof. The last three assignments charge that the carriers were denied the protection of the Federal law in that they claim that the loss was not "caused by" them or either of them.

We arrange our argument according to these three groups.

The Carriers Were Entitled to Have Their Liability Determined by the Federal Law.

The Action Is Based on the Carmack Amendment.

It will, at once, be conceded that the original action was brought under the express provisions of the Carmack Amendment and was brought upon an interstate bill of lading, for the alleged loss of an interstate shipment. We say this with assurance, because the original petition (Trans., p. 2) reads, in part, as follows:

"And petitioner further avers that section 7 of the act of Congress of June 29th, 1906, amending section 20 of the act of Congress of February 4th, 1887, provides:

"'That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or a bill of lading therefor and shall be liable to the lawful holders thereof for any loss, damage, or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed, provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.'

"Petitioner further alleges that the New Orleans and Northeastern Railroad Co. is, therefore, liable to it, jointly and *in solido* with the Southern Railway for its loss and damage resulting from the destruction of said rice."

And the bills of lading declared upon in the oiginal petition (appearing between pages 4 and 5 of the transcript) show that the shipments out of which the claim herein presented arises originated at New Orleans, La., and were consigned to Charleston, S. C.

The Question of Liability Upon an Interstate Bill of Lading is One of Federal Law.

It is equally clear that under these circumstances the plaintiffs in error were entitled to the rights, privileges and immunities set forth in the assignments, namely, the right to have their liability determined according to the provisions of the Carmack Amendment and the rules of the common law inhering therein and declared thereby, and not according to the State statutes, law, jurisprudence or public policy.

We say that this is equally clear, because this court, in several very recent cases, has enunciated that doctrine in terms so clear, backed by logic so conclusive, as to forever dispose of the point. We refer to the decision of this tribunal in Adams Express Company *vs.* Croninger, 226 U. S., 491, and to the following language used therein:

> "Under the law of Kentucky this contract, limiting the plaintiff's recovery to the agreed or declared value, was invalid, and the shipper was entitled to recover the actual value, 'unless,' as said in Adams Express Company *vs.* Walker, 119 Kentucky, 121, 129, and affirmed in Southern Express Company *vs.* Fox and Logan, 131 Kentucky, 257, 'sufficient facts are shown, independently of the special contract, to avoid the contract for fraud or to create an estoppel at common law.'
>
> "*The question upon which this case must turn, is, whether the operation and effect*

of the contract for an interstate shipment, as shown by the receipt and or of lading, is governed by the local law of the State, or by the acts of Congress regulating interstate commerce (p. 499).

* * * * * * *

"Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both federal and State courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States, Hart *vs.* Pennsylvania Railroad, 112 U. S., 331; or that determined by the supposed public policy of a particular State, Pennsylvania Railroad *vs.* Hughes, 191 U. S., 477; or that prescribed by statute law of a particular State, Chicago, &c., Railroad *vs.* Solan, 169 U. S., 133.

"Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the Supreme Court of Georgia in Southern Pacific Co. *vs.* Crenshaw, 5 Ga. App., 675, 687, 63 S. E. Rep., 865, where that court said:

" 'Some States allowed carriers to exempt themselves from all or a part of the common-law liability, by rule, regulation, or contract; others did not; the Federal courts sitting in the various States were following the local rule, a carrier being held liable in one court when under the same state of facts he would be exempt from libility in another; hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was prac-

tically impossible for a shipper engaged in a business that extended beyond the confines of his own State, or for a carrier whose lines were extensive, to know without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one State to another. The congressional action has made an end to this diversity; for the national law is paramount and supersedes all State laws as to the rights and liabilities and exemptions created by such transaction. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the State court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them.'

"That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liablity of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation, or contract. *Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it.* Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority the regulating power of the State

ceased to exist. Northern Pacific Ry. *vs.* State of Washington, 222 U. S., 370; Southern Railway *vs.* Reid, 222 U. S., 424; Mondou *vs.* Railroad, 223 U. S., 1.

"To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment. *The duty to issue a bill of lading and the liability thereby assumed are covered in full,* and though there is no reference to the effect upon State regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject."

This decision has been reaffirmed by this court in a number of cases.

The Federal Question is Properly Before This Court.

That the Federal question was so raised as to give this court jurisdiction and require its decision affirmatively appears from the decision of the Supreme Court of Louisiana (Trans., pp. 93 and 94), where the court said:

"On the rehearing only, the contention is that the suit is to be governed by the Car-

> mack Amendment to the Interstate Commerce Act, interpreted in the Croninger case, 226 U. S., 491."

and then proceeded to discuss and deny that contention. That such a disposition of a claim under a federal statute is sufficient to justify this court in taking up the question thereby raised has been affirmatively decided in the following cases, to wit:

> Mallett *vs.* North Carolina, 181 U. S., 589.
>
> Leigh *vs.* Green, 193 U. S., 79.

At page 85 of the opinion, in the case last cited, this court said:

> "A motion is made to dismiss because the claim of impairment of a right secured by the fourteenth amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the Supreme Court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska Supreme Court to decide the claim heretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the fourteenth amendment to the Constitution of the United States. Be this as it may, the Supreme Court of Nebraska entertained the motion and decided the federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing. Mallett *vs.* North Carolina, 181 U. S., 589."

Rights Secured to Plaintiffs in Error by Federal Law Were Denied Below.

That the rights so clearly existing and duly set up were denied to plaintiffs in error by the State court is, we believe, susceptible of equally clear demonstration as follows:

It is conceded by all parties that the shipments in question moved from New Orleans, La., to Hamburg, S. C., and were there destroyed by a fire, originating in two cars of lime which were, on August 27, 1908, ignited by a flood on the Savannah River, which flood was the highest flood ever recorded upon that water course—that is to say, the direct cause of the destruction of the shipments was an act of God in the form of a flood. The petition (Trans., p. 3), however, avers that the destruction of the shipments was due to the negligence of the carriers.

The vital question at once arises: It being proved and admitted that the loss was caused by the act of God, upon which party devolves the burden of proof upon the question whether any negligence on the part of the carrier contributed proximately to the loss?

The Burden of Proof.

We have seen that the question is one to be determined under the federal law. What the doctrine of that law is clearly appears from the decis-

ion of this court in the case of Memphis R. R. Co. *vs.* Reeves, 10 Wall., 176. We quote the headnote:

> "When a common carrier shows that a loss was by some *vis major,* as by flood, he is excused without proving affirmatively that he was guilty of no negligence.
>
> "The proof of such negligence, if the negligence is asserted to exist, rests on the other party.
>
> "In case of a loss of which the proximate cause is the act of God or the public enemy, the common carrier is excused, though his own negligence or laches may have contributed as a remote cause.
>
> "The maxim *causa proxima non remota spectatur* applies to such cases as to other contracts and transactions; and ordinary diligence is all that is required of the carrier to avoid or remedy the effects of the overpowering cause."

The doctrine expressed in the above case has obtained in the federal courts from the time of Clark and Barnwell, 12 How., 272, down to date. Cau *vs.* Texas & Pacific Ry. Co., 194 U. S., 427.

Our opponents frankly conceded in the oral argument in the Supreme Court of Louisiana that the foregoing quotation correctly states the law on the subject as laid down by the federal courts.

If it be conceded that the loss was due to the act of God, and if it be conceded that the defendant in error charged that the plaintiffs in error were liable because of negligence contributing to that

loss, then it must be conceded that the Carmack Amendment secured to the carriers the affirmative protection and right to insist that such alleged negligence be proven by the claimant.

This affirmative right and this protection the Supreme Court of Louisiana denied to the carriers. That court said (Trans., p. 94):

> "As relates to the Adams Express Co. *vs.* Croninger, 226 U. S., 148, on which reliance is placed: It does not appear that the rules of evidence have been changed by the interpretation laid down in that decision so as to shift the burden and to have the effect of nullifying the Civil Code of this State upon the subject. * * *
>
> "We annex a copy of the amendment in the margin, containing all that there is upon the subject in the Federal Interstate Law. Not one word expresses the intention of repealing the rule fixing onus of proof under state statutes. Save that—as there are specimen—of the others. Patton *vs.* Pickle, 50 La. Ann., 857, and Spurlock *vs.* Traction Co., 118 La., p. 1.
>
> "There is no necessity of citing our decisions, as they uniformly hold that the onus is with the defendant.
>
> "The State law should undoubtedly stand as it is, as it is not in conflict with the federal law or jurisprudence. * * *
>
> "Defendant admitted the loss and averred that it did all it could. It should have proven the averment."

The State court thus expressly held that under the State law the onus was on the carriers to prove

themselves free from negligence, and expressly held that it proposed to apply and it did apply that rule to the case at bar. It thereby expressly denied to the carriers the protection of the federal statute and the federal rule implicate therein, which federal statute and rule place that onus, not upon the carriers, but upon the shipper.

The fact that the State court rested its conclusion upon error as to the burden of proof and so denied to the carriers their federal right to insist that the holder of the bill of lading must prove them negligent, when once they had proven that the destruction of the rice arose from an act of God, further appears from the language used by the court in a number of other places in its opinion. Thus it says, speaking of a delay to one of the cars in moving from New Orleans to Hamburg:

> "The cause of the delay of these cars in Augusta is not explained" (Trans., p. 86).
>
> "The cars were ready to be hauled away; no one testified why they were not hauled to destination" (Trans., p. 92).
>
> "They [the carriers] failed to prove ordinary care" (Trans., p. 92).
>
> "There was an engine and crew on the yard; they were not timely called upon to prevent the loss; or, if called, it is not proven. It was an emergency; some concern ought to have been shown to prevent the destruction of the property. This is the impression created by the evidence; if it were different, if those in authority and those under their orders on the occasion were sufficiently active, the evidence on the

> subject is weak and not convincing" (Trans., p. 93).
>
> "Defendant admitted the loss and averred that it did all it could. It should have proven the averment" (Trans., p. 95).

By denying to the carriers the shield and protection of the federal rule and statute, which federal rule and statute entitled them to insist that the shipper should prove them negligent under the circumstances of this case, the State court held the carriers liable. In doing so, it expressly based its finding upon the theory that the carriers had failed to prove themselves free from negligence. The foregoing quotations from the court's opinion affirmatively show this, and the fact that it is true is brought into the limelight by comparing the first opinion of the Supreme Court of Louisiana with the second opinion of that same tribunal.

The syllabus of the first opinion which was prepared by the court (Trans., p. 75) reads as follows:

> "Where, in an action to recover the value of goods entrusted to a carrier and destroyed in transit, it is shown that the proximate cause of the loss was an unprecedented flood, the burden of proof rests upon the plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise, by the carrier, of reasonable care and skill."

After the opinion of which the foregoing is the syllabus, and *which decided the case in favor of the*

carriers, was handed down, the defendants in error filed an application for a rehearing (Trans., p. 76), which opens with the following significant paragraph:

> "The gist of the court's opinion is found in the syllabus, which reads as follows:
>
> " 'Where, in an action to recover the value of goods entrusted to a carrier and destroyed in transit, it is shown that the proximate cause of the loss was an unprecedented flood, the burden of proof rests upon the plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise, by the carrier, of reasonable care and skill.'
>
> "This decision is based upon the following cases:
>
> " 'Memphis *vs.* Reeves, 77 U. S., 176; Elam *vs.* St. Louis, etc., R. R., 93 S. W., 851; I. & G. N. R. R. *vs.* Gergman, 64 S. W., 999, but not a single Louisinaa decision is given, though the contract in question was a Louisiana contract, and the forum a Louisiana court, and all the authorities on the conflict of laws hold that Louisiana law should govern. In so holding this honorable court has broken a rule founded on justice and common sense, and established by a long series of well-reasoned and abled decisions running from the 6 Martin to the 115 La.'
>
> * * * * * * *
>
> "The court further erred in maintaining the following limitation of defendant's bill of lading:
>
> " 'Neither this company nor any of its connecting carriers shall be liable for any damage to or destruction of said property

> by fire, unless such damage or destruction shall result directly and exclusively from their negligence or that of their employees, and unless such negligence shall be affirmatively established by the owner of the said property.' * * *
>
> "This restriction must be interpreted by Louisiana law. (See Minor on Conflict of Laws, page 169.) This court has repeatedly held that a carrier cannot contract against its own negligence."

In other words, the keynote of the application for a rehearing was that the court had applied the wrong rule of law to the case—that it had applied the federal law, where the State law was applicable.

That application and that erroneous contention prevailed. The rehearing was granted. The Louisiana law was applied and because that law was so erroneously applied, the case was on the same evidence re-decided, this time adversely to the carriers. The demonstration of a denial of a federal right to these plaintiffs in error and of the prejudice to their interests attendant upon the denial of that right could not well be more complete. The same court decided the same case twice. Once it granted to the plaintiffs in error their constitutional and statutory rights,—applied the federal rule, and when it did so, decided in favor of the plaintiffs in error. The second time it denied to the plaintiffs in error those constitutional and statutory rights,—applied the State rule and decided against them.

It follows that the case turned upon a question of law—the question of the applicability of the federal law and, if applicable, of its construction and effect. If, therefore, it be held that under the Carmack Amendment, as interpreted by this court in the Croninger case, the federal law and that law only is to be applied, and that under the federal law the burden of proving negligence was upon the defendant in error after the carriers had proved that the destruction of the shipment was due to an act of God, the carriers are entitled to have the judgment below reversed. If Louisiana can still apply her rule on this subject, the chaotic condition which existed before the enactment of the Carmack Amendment, as so vividly depicted and illustrated (see the reference to the Hughes case) by the court in the Croninger case, still obtains, despite the fact that this court emphatically declared in that case that it was the purpose of Congress in enacting the Carmack Amendment that the chaos resulting from conflicting State legislation and jurisprudence upon this interstate subject-matter should be destroyed. It is also obvious that the question of the incidence of the burden of proof in a case of this kind is a vital one.

The Clause of the Bills of Lading Requiring the Owner Affirmatively to Establish Negligence on the Part of the Carrier Is Valid under the Federal Law.

This phase of the case is covered by assignments of error Nos. 7 and 8.

Even if this court should reach the conclusion that the rule as to burden of proof of negligence on the part of the carrier, after it has shown loss by act of God, which has always obtained in the federal courts, should be changed, it would still in this case have to pass upon, as a question of federal law, the validity of the following provision of the bills of lading sued upon (Missouri, &c., Ry. Co. *vs.* Harriman Bros., 227 U. S., 657):

> "Neither this company nor any of its connecting carriers shall be liable for any damage to or destruction of the said property by fire, unless such damage or destruction shall result directly and exclusively from their negligence or that of their employees, and unless such negligence shall be affirmatively established by the owner of said property."

By turning to the petition (Trans., p. 3) the court will find that the defendant in error sued expressly upon and in affirmance of the contracts contained in the bills of lading attached to the petition. These bills of lading were set up without reservation as the contracts between the parties and as the measure of the duty, obligation, and lia-

bility of the parties. Turning again to the petition (Trans., p. 3) the court will find the following allegation:

> "Your petitioner specially avers that the destruction of the said rice was due solely to the negligence, fault and want of care of the said Southern Railway Company, its agents, servants and employees."

The original plaintiff, defendant in error, has, therefore, expressly sued upon and affirmed a contract, under which it assumed the burden of affirmatively proving negligence on the part of the carriers. And, in addition to suing upon this contract, it has, in its petition, expressly set forth the affirmative allegation that the fault was due solely to the defendant. Notwithstanding all this, the Supreme Court of the State of Louisiana has ridden rough shod over the contract between the parties, and without any prayer to that effect by the original plaintiff, defendant in error, has wiped out the stipulations of that contract and has held that the burden of proof was and is upon the carriers. This holding is in the teeth of the federal jurisprudence upon the subject.

This court has held that clauses such as the one in question, relating to the conditions under which liability may be established, are not attempted exemptions from liability for negligence, and, that being true, there is no basis for claiming that the clause in question is invalid when tested, as it must be (Adams Express Co. *vs.* Croninger, 226 U. S.,

491; Missouri, etc., Ry. Co. *vs.* Harriman Bros., 227 U. S., 657), by the federal law, inhering in and declared by the Carmack Amendment.

Memphis R. Co. *vs.* Reeves, 10 Wall., 176.

Cau *vs.* Texas & Pacific Ry. Co., 194 U. S., 427.

Washburn-Crosby Co. *vs.* William Johnston & Co., 125 Fed., 273.

Assignment No. 9 raises practically the same question in a little different aspect. Said assignment is as follows:

> "The Supreme Court of Louisiana erred in holding that the burden was upon the Southern Railway Company, plaintiff in error, to prove all of the following allegations in its answer:
>
> > " 'Respondent avers that this happened without any contributory negligence on its part, and that the sudden and unprecedented flood which could not have been anticipated, with the resultant fire, was the proximate cause of the destruction of the plaintiff's property. Respondent avers further that the cars were not unreasonably delayed and that nothing could have been done by respondent which was not done to save the property.'
>
> "in that under the provisions of the Carmack Amendment construed in the light of the federal common law inhering therein, after said plaintiff in error had proved that a sudden and unprecedented flood, which could not have been anticipated, with the re-

> sultant fire was the cause of the destruction of the property, the burden was upon the defendant in error to prove that said plaintiff in error failed to do anything that could have been done by said carrier to save the property."

That the Supreme Court of Louisiana so held is apparent from the following language used in its opinion (Trans., pp. 94-5):

> "The burden was upon the defendant to sustain the following allegations in its answer: 'Respondent avers that this happened without any contributory negligence on its part, and that the sudden and unprecedented flood, which could not have been anticipated, with the resultant fire, was the proximate cause of the destruction of plaintiff's property. Respondent avers further that the cars were not unreasonably delayed and that nothing could have been done by respondent which was not done to save the property.
>
> "Defendant admitted the loss and averred that it did all it could. It should have proven the averment."

That no such burden was upon the defendant under the federal jurisprudence appears from the following case, and was conceded by counsel for the defendant in error in the Supreme Court of Louisiana. In Memphis R. R. Co. *vs.* Reeves, 10 Wall., 176, this court said (p. 189):

> "A common carrier assumes all risks except those caused by the act of God and the

> public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused."

The facts of that case were that a shipment of tobacco was delayed through the negligence of the carrier; that while so delayed rocks fell upon the track from Lookout Mountain, necessitating the holding of the cars at Chattanooga; that while they were so held the tobacco was destroyed by a freshet in the Tennessee River.

See also:

> Washburn Crosby Co. *vs.* William Johnston & Co., Ltd., 125 Fed., 273.
>
> Union Insurance Co. *vs.* Shaw, 2 Dill, 14; 23 Fed. Cas. No. 14,366.

Thus, the Supreme Court of Louisiana has, notwithstanding the timely application of the plaintiffs in error, declined to apply to this case the rule of law existing in the federal courts, thereby depriving plaintiff in error of a shield and protection extended to them by Congress in the Carmack Amendment.

The Loss Was Not "Caused By" the Carriers.

If It Be Assumed That There Was Negligent Delay, Such Delay Was Not the Proximate Cause of the Loss.

This aspect of the case is covered by assignments 9, 10 and 11.

The Supreme Court of Louisiana said in its opinion (Trans., p. 86):

> "One bill of lading was dated Aug. 22, 1908, and the other, Aug. 24th, 1908, although shipped on different days they were both at Augusta at the same time.
>
> "The cause of the delay of these cars in Augusta is not explained."

And in several other places in its opinion the court referred to delays to the cars in question.

Suppose now that we concede, *arguendo,* that one of these cars was negligently delayed by the carriers for two days and that it was subsequently destroyed by said unprecedented flood. What then? The delay would not constitute the proximate cause of the loss. Upon this point the decisions of this court in the Reeves case, *supra,* is directly in point.

In that case this court said (p. 191):

> "As the case must go back for a new trial, there is another error which we must notice, as it might otherwise be repeated. It is the third instruction given by the court, to the

> effect that if defendant had contracted to start with the tobacco the evening before, and the jury believe if he had done so the train would have escaped injury, then the defendant was liable. Even if there had been such a contract, the failure to comply would have been only the *remote* cause of the loss." (Italics ours.)

This court in the same case refers to a Pennsylvania case as follows (pp. 190, 191):

> "In Morrison *vs.* Davis & Co., goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur*, applied as well to the contracts of common carriers as to others. The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill and foresight, which it defines to be the common prudence which men of business and heads of family usually exhibit in matters that are interesting to them."

We also call attention to St. Louis, Iron Mountain & Southern Railway Co. *vs.* Commercial Ins. Co., 139 U. S., 237, where the court declared:

"The delay of the defendant railway company to furnish transportation according to its contract with the Compress Company was in no legal sense the cause of the destruction of the cotton. It was simply one of a series of antecedent events without which the loss could not have happened, for, if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled, by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation. Upon principle and authority, that neglect was not the direct and proximate cause of the loss by fire, and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers. Railroad Co. *vs.* Reeves, 10 Wall., 176; Morrison *vs.* Davis, 20 Penn. State, 171; Denny *vs.* N. Y. Central R. R., 13 Gray, 481; Hoadley *vs.* Northern Transportation Co., 115 Mass., 304; Dubuque Ass'n *vs.* Dubuque, 30 Iowa, 176; Daniels *vs.* Ballantine, 23 Ohio State, 532."

See also, to the same effect:

Milwaukee & St. Paul Ry. Co. *vs.* Kellogg, 94 United States, 469.
Schaeffer *vs.* R. R. Co., 105 U. S., 249.
Thomas *vs.* Lancaster Mills, 71 Federal, 481.
Empire State Cattle Co. *vs.* Atchison R. R. Co., 135 Federal, 141.

The Facts as Found by the State Court show That the Loss of the Goods Was Not "Caused By" the Carriers or Either of Them Within the Meaning of the Carmack Amendment.

The question of liability in this case is to be determined by the answer to the question, "Was the loss 'caused by' plaintiffs in error or either of them? The Carmack Amendment controls the matter, and under that statute the carriers are liable if they "caused" the loss. The carriers caused the loss if they were guilty of negligence as a proximate cause, otherwise not. The question of liability resolves itself, then, into the question of negligence *vel non*. The question of negligence is a mixed question of law and fact. While ordinarily this court, upon writ of error to a State court, is bound by the State court's findings of fact, it is not bound by the State court's conclusions of law upon those facts. The plaintiffs in error contend that there was no negligence on the part of Southern Railway Company, that they have so proved, and that there is in the record no substantial evidence to the contrary. They do not ask, and do not need to ask, this court nicely to weigh the evidence in this record with a view to determining whether it preponderates in their favor, but they respectfully ask the court, *upon the undisputed evidence and facts found as facts by the State court,* to find that the State court has com-

mitted reversible error in that the legal conclusion that the carriers exercised due care and did not "cause" the loss, follows from such undisputed evidence and findings, and therefore the carriers are, as a matter of federal right, entitled to a reversal, in that the judgment of the State courts is such as to deprive them of federal rights based on the Carmack Amendment. Accepting any and all findings of fact by the State court, we find that the vice in its conclusions is due to one controlling error of law, viz., that the court has, as unmistakably appears from its opinion, found that the carriers have not sufficiently explained the not taking of earlier measures to avoid the consequences of an act of God, which esults the carrier *could not reasonably anticipate*. It suggests action that should have been taken to safeguard the property in question when at the time the carrier had no reason to anticipate that any such action was necessary to the preservation of the property. This will clearly appear from the evidence as recited and the facts as found by the State court, now to be set forth. We contend that, even if the burden of proof were, under the law properly applicable, upon the carrier to negative negligence the plaintiffs in error have shown the exercise of reasonable care, not simply by preponderance of evidence, but as the only permissible inference and conclusion of law from the undisputed evidence and the findings of the court below.

In support of our contention on this aspect of the case, we refer to decisions of this court, which go certainly as far as the necessities of our present contention require:

Southern Pacific Co. *vs.* Schuyler, 227 U. S., 601.

Schlemmer *vs.* Buffalo, &c., Ry. Co., 205 U. S., 1.

North Carolina R. Co. *vs.* Zachary, 232 U. S., —.

The carriers have proved, in this case, that the loss was caused by a totally unprecedented flood in the Savannah River. The plaintiff (defendant in error) introduced no witness on the question of negligence.

The Findings of Fact and the Evidence.

The Supreme Court of Louisiana held (Trans., p. 89) that the height to which the water rose during the flood in question was 38 feet 8 inches, and it has given the records of other rises in the Savannah River from 1888 down to the date upon which this case was tried (Trans, p. 91). A comparison of the height to which the flood in question rose, namely, 38 feet 8 inches, with the other flood records, shows that it is without parallel in the history of floods of the Savannah River (Trans., p. 91).

The Supreme Court of Louisiana has also held that the facts in the case, as testified to by the witnesses, are as follows:

It recites the testimony of Witness Hungerford (Trans., p. 89):

> "The superintendent, Hungerford, testified that on the 25th of August, the stage of the water of the Savannah River was reported as twenty-two feet, three inches on the gauge of Augusta, and that a report was issued from the Weather Bureau *of a probable rise to a stage of thirty-three feet at Augusta.* That on the morning of the twenty-sixth the Savannah River rose rapidly higher than had been anticipated by the before-mentioned forecast. By noon of August 26th the river had reached a stage of thirty-six feet, continuing to rise and reaching a stage of *thirty-eight feet, eight inches,* about two o'clock A. M. on August 27th. That excessive rains fell in the northeast portion of the State from the twenty-fourth to the twenty-sixth and caused great damage by floods and the rapidity of the current. At ten o'clock on the 26th the gauge registered thirty-four feet and seven inches and the River was rapidly rising. *At that time, supplemental warning, was issued by the Weather Bureau placing the maximum stage at thirty-eight feet by midnight.*"

It declares that the witness Southall swore (Trans., p. 85):

> "That on the morning of Aug. 26th, 1908, he received car 12406 and car 15545 from

> the Georgia R. R. They are the cars which were afterwards destroyed. He had them placed in a train of cars which was being made up for Charleston." * * * "The rise (on that morning) *was very rapid and unexpected.*"

It declares that the witness Southall swore (Trans., pp. 85, 86), that he had

> "never seen the water as high except in the freshet of 1888."

It holds that the yardmaster swore (Trans., p. 86):

> "That the condition of the yard was normal; that the yard was in his charge from seven o'clock a. m., and that the switch foreman was in charge at night. That there was a full crew during the day and a full crew at night, and one engine from twelve noon to twelve midnight. That he received a message from the superintendent on the evening of August 25th, that the indications were that there would be a rise in the Savannah River. Until twelve o'clock that night, this witness said the River was not out of its banks, and there were no indications of a serious rise. That, when he went on duty at seven o'clock A. M. of August the twenty-sixth, the River was rapidly rising, and in thirty-five minutes it had risen so rapidly that it covered a switch stand; that when he came on duty he saw that the River was rising and he took an engine and tried to reach the cars. On the main track to old Hamburg, there were three trestles,

and one of these trestles was undermined by the rapidly running water so that he could not get the engine over the trestle to reach the cars. That he moved all other cars to high ground and weighted down the main trestle with cars and one trestle in the Old Hamburg yards also. That altogether thirty-seven cars were destroyed in the Old Hamburg Yard by fire, caused by water reaching a car of lime and slacking the lime and setting fire to the cars. That the cars in the Hamburg yards were made up into trains to be moved on the order of the inspector. That people living in Augusta for years did not anticipate the unprecedented rise. A number of buildings were ruined. Others were destroyed by fire. That in the freshets several men were drowned in trying to escape from one of the buildings. He had seen the River rise several times previous to Aug. 26th, 1908, and witnessed heavier rains, but had never seen the River extending over its banks, and he had never seen the River rise into the yards previous to Aug. 26th, 1908."

It recites that the switchman swore (Trans., pp. 86, 87):

"The switchman of the W. & A. Railway Company at Atlanta, swore that on the twenty-fifth, twenty-sixth and twenty-seventh of August, 1908, he was working for the Southern Railway Company at Augusta, Ga.; that the old Hamburg Yard was submerged by water to a height which put the water several feet in the freight cars which were standing in the yard. He had been

living in Augusta, Ga., for about twenty years and had never seen the river as high; and that there was a rapid current in the Hamburg Yard. That, while he has no record of the previous high water, the flood of 1908 was by far the highest and most destructive that he had ever seen. He reported for work at seven o'clock in the morning of August 26th, and he and others reached the Hamburg Yard about twenty minutes after seven o'clock A. M., and that upon reaching the yard, they had to get off the main line on a side track in order to let a passenger train go by." * * *

"Witness further states that, at that time, the tracks were under water, and, in order to get to the old Hamburg Yards, where the cars were, they had to change two switches. That this necessitated the cleaning out of sand and mud from between the rails and consumed some little time. That they then proceeded to the old Hamburg Yards for the purpose of pulling out the cars. In order to do this, they had to pass over three trestles. When they passed the trestle designated as the 'scale trestle' it sunk down six or seven inches, showing that it had been undermined; and that when they passed the next trestle and pushed the tender upon it, that it went down ten inches; that they were afraid to go any further. That they were all on the top of the tender at the time ready to jump off if the engine turned over; that as they could proceed no further, the engineer jumped in his cab and stopped the engine; that they returned and in passing the scale trestle they noticed that it went down further than when they passed the first time.

That then they pushed three gravel cars on the scale trestle to hold it down and keep it from floating away. That the other trestles had floated away. That he remained working in the yard until eleven o'clock; that the water was high and the current strong so that they could do nothing to save the freight. *That they did not at any time think the water would rise sufficiently high to get into the freight cars.* That he had to return to his home to see to the safety of his family; the floor of his home being under water, he had to remove his furniture to the second story. That the water rose rapidly and suddenly."

It holds that Henry P. Tyler, inspector, swore (Trans., p. 87):

"The old Hamburg Yards were submerged by water on the twenty-sixth and twenty-seventh of August, 1908; the water rose *about six feet in the yards;* there was a strong current, caused by the lumber, trees and drift wood which were banked up against the railroad trestle to a height of about six feet. There were two trains of freight cars in the yard, ready to go out. When they discovered the fire in the cars, they endeavored to find a boat; telephone communication, he said, had been abandoned as the line by rise of the water could no longer be used and they had to wait until some one happened to come within hailing distance in a boat. After a time they did find a boat; he and three others rode out to the train of cars that were burning and put out the fire by throwing buckets of water on

them. They stopped the fire just before it reached a carload of sheep and saved them. There were logs, wood and timber floating in the current. He was upon the trestle of the Hamburg yards about eight o'clock A. M. of August the twenty-sixth, and helped to move away the drift so as to try and keep an opening under the trestle to let the current flow through. This was before he went in the boat to help put out the fire in the freight cars."

It holds that Inspector Benson swore (Trans., p. 88):

"That on August 25th, 1908, there was no water in the Southern Railway Company's yard at Hamburg; that on the morning of August 26th, he reported for work at seven o'clock, and at that time the water had just reached the rail in front of the block office, and from then on the water rose at an increasingly rapid rate until it finally reached a height of five and a half feet in the yard with a rapid current flowing through. He was employed at this place as early as 1888. During the freshet that year (1888), the water ran over the yard; that the current was not as strong in 1888; that the River was higher in 1908 than in 1888; that the overflow was unprecedented; that at half past eight o'clock on the morning of Aug. 26th, he saw engineer Dent with his crew try to reach the cars which were stationed on tracks Nos. One and Five in the old Hamburg Yards; when the tender of the engine was pushed upon the scale trestle, he saw it sink several inches, and a few minutes later he saw them abandon the effort to reach the

> cars in the old Hamburg Yard; that about two o'clock in the afternoon, a fire broke out in one of the cars; that they could not go to the rescue of these cars because they had no boat; that the next morning, they found a boat and that he and three other men rode to the cars and stopped the fire."

It holds that Yard Conductor Sykes testified (Trans., p. 89):

> "That the cars in question, in which the rice of plaintiff was, formed part of the train which was to leave for Charleston, South Carolina. He says that he left the yards at six o'clock, went to breakfast, came back to the office at half-past seven o'clock P. M. He worked in the office until eleven o'clock and then had to wade in water neck deep to return to his home."

The facts as set forth above were the facts upon which the Supreme Court of the State of Louisiana predicated its judgment. Epitomized, they are:

1. The cars were being handled by the carriers in the usual course of business; that is to say, they were made up into a train, ready to move forward promptly for Charleston, the point of destination. (See Sykes, p. 89; yard clerk, p. 85.)

2. They had been so located in the usual course of business about one a. m. of the night of August 26, 1908 (Trans., p. 88).

3. Up to twelve o'clock on that night the river

was in its banks and there was no indication of a serious rise (Trans., p. 86).

4. The United States Weather Bureau up to 10:30 in the morning of August 27 had predicted a maximum rise of 33 feet (Trans., pp. 33, 34; opinion, p. 89).

5. Under these circumstances the cars were placed in a yard which WOULD BE DRY when the river was at a 33-foot stage. We say this advisedly, because from the facts found by the Supreme Court of Louisiana it appears that when the water rose to the height of 38 feet 8 inches the water was between five and a half and six feet deep in the aforesaid yards. (See opinion, Trans., p. 87; Tyler's testimony, opinion, Trans., p. 88; Bevens' testimony.)

The cars were placed in a yard which became submerged only to a depth of between five and a half and six feet (Tyler, p. 87); when the Savannah River was at the unprecedented stage of 38 feet 8 inches; when the residents of Augusta were obliged to wade in water neck deep to get to their homes (opinion, Trans., p. 89) and obliged to remove their furniture to the second floor of their houses because the first floor was under water (Trans., p. 87); when several men in Augusta were drowned while trying to escape from a store (opinion, Trans., p. 86), and when a number of buildings in Augusta were ruined by water (Trans., p. 86), and when the streets of Augusta, Ga., were running like a mill race (Trans., p. 34).

This conclusively proves that if the flood stage of the river had only reached 33 feet—that is to say, had stopped at a stage five feet 8 inches lower than the stage at which it actually stopped—the yard in which these cars were placed would have been dry. In other words, the carriers when the Weather Bureau predicted a stage of 33 feet, placed these cars in a yard which was safe and dry with the water at that stage, and placed them in a yard six feet higher than the average flood stage of the said Savannah River. (See Trans., p. 91, showing average flood stage at 27 feet and under.)

6. If a railroad when told by the United States Weather Bureau that a river will rise to a stage of 33 feet, places cars in a yard which will be dry at said 33-feet stage, and if, because the river suddenly and unexpectedly rises to an absolutely unprecedented height, those cars are damaged, can it reasonably be said that that damage was "caused by" the railroad? Can this be said, when the *patres familiares* of the neighborhood are losing their lives, having their stores, houses, bridges, and even farm lands themselves, swept away by the same floods? (See appendix, entitled: "What the Other Prudent Men Did.")

7. The United States Weather Bureau, a skilled corps of trained experts, having at its command the organized resources of the Government, reached the deliberate conclusion that the maxi-

mum stage of the Savannah River would be thirty-three feet, and issued a warning, so stating on August 25, 1908 (Opinion, Trans., p. 89). That skilled corps of experts did not realize that they had underestimated the height of the flood, until 10.30 o'clock on the morning of August 26, 1908 (Opinion, p. 89).

8. The railroad people were more alive to the situation and more active than were the skilled and trained United States Weather Bureau experts, for the railroad people realized three hours sooner than the weather men did, that they, the Weather Bureau, had underestimated the height of the flood, and they endeavored, at 7.20 a. m. on the morning of August 26, 1908, to remove the cars here in question, from the yard, which was safe at a 33-foot stage.

9. In their very prompt effort to move these cars, the railroad actually imperilled the lives of a train crew. What they did is thus stated in the opinion (Trans., p. 87):

> "* * * At that time, the tracks were under water, and in order to get to the old Hamburg Yards where the cars were, they had to change two switches. That this necessitated the cleaning out of sand and mud from between the rails and consumed some little time. That they then proceeded to the old Hamburg Yards for the purpose of pulling out the cars. In order to do this,

> they had to pass over three trestles. When they passed the trestle designated as the 'scale trestle' it sunk down six or seven inches, showing that it had been undermined; and that when they passed the next trestle and pushed the tender upon it, that it went down ten inches; that they were afraid to go any further. That they were all on the top of the tender, at the time, ready to jump off if the engine turned over; That as they could proceed no further, the engineer jumped in his cab and stopped the engine; that they returned and in passing the scale trestle, they noticed that it went down further than when they passed the first time. That then they pushed three gravel cars on the scale trestle to hold it down and keep it from floating away. That the other trestles had floated away."

10. When a railroad acts so promptly that it is three hours ahead of the trained and skilled corps of United States Weather Bureau experts, and when they go so far in their efforts to protect merchandise entrusted to their care, as to imperil human life, and when the prompt and decisive action thus taken is futile only on account of the amazing suddenness in the rise of a river by a flood caused by rains falling many miles away, can it fairly be said that the resultant loss was "*caused by*" the railroad companies?

11. It must not be forgotten that the rainfall which caused the flood fell, not in or near Augusta, Ga., but fell 102 miles (if we take the figures of the defendant in error) away. The railroads,

therefore, had no means of knowing what the flood amounted to, save such information as they derived from the Weather Bureau reports. Those reports estimated the flood at 33 feet until too late to save the property.

12. The opinion states (Trans., pp. 87, 88) that the witnesses Tyler and Benson swore as follows:

Tyler swore:

> "When they discovered the fire in the cars they endeavored to find a boat; telephone communications, he said, had been abandoned as the line by rise of the water could no longer be used and they had to wait until some one happened to come within hailing distance in a boat. After a time, they did find a boat; he and three others rode out to the train of cars that were burning and put out the fire by throwing buckets of water on them. They stopped the fire just before it reached a car load of sheep and saved them."

Benson swore:

> "That about two o'clock in the afternoon a fire broke out in one of the cars; that they could not go to the rescue of these cars because they had no boat. That the next morning, they found a boat and that he and three other men rode to the cars and stopped the fire."

This finding of fact is amply justified by the testimony of these two witnesses, whose testimony is in the record (Trans., pp. 26 and 28) and reads as follows:

Tyler swore (p. 26):

> "When the water rose to a height which put it in the cars standing in the railway yard, a fire broke out in one of these cars. As soon as this fire was discovered, we endeavored to get a batteau in order to go out there and put the fire out. Telephone communications, however, had been abandoned and we had to wait until some one happened to come within calling distance in a batteau. We got to the very first one that we could get and myself, together with three other men, rode out to the train of cars that were burning and put the fire out by throwing buckets of water upon it. We stopped the fire just before it reached a carload of sheep and saved them from being burned. The current was very swift and we found this work very dangerous. There was also danger from logs of wood and timber which were floating down with the current."

Benson swore (p. 28):

> "In the afternoon, *i. e.*, about two o'clock, after the water had risen to a height which put it into the freight cars, a fire broke out in one of these cars. We were unable at that time to get a batteau and in fact, had we gotten one, the current was so swift, that we would have been unable to have rowed out to where the cars were burning without capsizing. The next morning, however, we got a boat and myself, together with three other men rowed out to the cars and put the fire out by throwing buckets of water on it. We saved one car of live stock, and several empty cars, but about twenty-nine cars had been consumed by the fire."

There is no other testimony on the subject in the record. When a railroad shows that it secured the first available boat after the fire was discovered, and sent men in said boat to extinguish the fire, can it in any fair sense be said that the loss resulting from the fire was "*caused by*" the railroad company?

Comments Upon the Basis of the State Court's View that the Carrier Did Not Negative the Existence of Negligence on Its Part.

The court (Trans., p. 86) recites evidence showing that the cars of lime were placed in the Hamburg yard and asks:

> "Why make up a train with two cars of lime (after the high-water-mark warning) in the lowest part of defendant's yards?"

Similar suggestions are made on pages 88 and 90.

We answer that the warning predicted a rise to 33 feet, at which height not only the contents of the cars but the yard itself would have been dry.

The court (Trans., p. 87) refers to the attempt of the yard crew to reach the cars, and says:

> "We are impressed by the fact in all this that the attempt at rescuing property was only made after eight o'clock in the morning of August twenty-sixth."

At page 88:

> "Several of the witnesses reported to work at about the usual hour (seven

> o'clock); * * * Why did they not make a serious attempt to move the cars on the morning of the 26th, when they reported for work?"

The switch-engine conductor testifies (Trans., p. 24) that he and his crew were required to report on the Georgia side of the river; that the engineer, after reporting, has to oil his engine, etc.; that "on the morning in question we reached the Hamburg yard at about 7.20 a m., just ahead of the passenger train which was leaving Augusta for Charleston, S. C." He then goes on to show that he and his crew proceeded at once to try to reach the cars in question to pull them out, gives the causes of delay, such as the necessity of cleaning mud and sand from two switches that the rising water had submerged, and relates how it was impossible to cross the intervening switches, though the crew evidently subjected themselves to great risk in the attempt. Engineer Dent testified to the same effect (Trans., p. 29).

Compare the evidence of these men and other witnesses (not connected with the railroad) who saw their courageous attempt to reach the cars with the inference drawn by the court (Trans., p. 90):

> "Leisurely enough, the employees went about their business and gave very little concern to the rising waters. Those who did attempt to save property (if what they did can be considered in that light) displayed very little activity."

On page 90 the court refers to the evidence that the cars could not be reached because there was no boat available. As to this, the court says (Trans., pp. 90, 91):

> "It does seem strange that near a city a boat could not be gotten on the first day. We do not infer that they were cut off entirely from the city, where there were boats."

Is there anything in this, if we bear in mind the testimony on this phase, warranting the view that it goes to show that the carriers had not disproved negligence?

The court repeats over and over again that the railroad carried the cars to the lower side of the river and after it had placed them there did not try to remove them in time to succeed in doing so, and upon this it bases the idea that the carrier had not disproved indifference on the part of its employees, disregarding the conclusive and undisputed evidence that at the times in question danger to the contents of the cars could not be, and was not, apprehended. A reading of the court's opinion compels the conclusion that, upon the facts, not only no conclusion of negligence can be predicated, but that an affirmative conclusion that the carrier exercised due care is compelled. Hence the protection of the plaintiffs in error in their federal rights requires a reversal.

Let the error of the State court as to the burden of proof be coupled with its erroneous inferences and conclusions of law from the undisputed evidence and its own findings of fact and the conclusion that the protection of federal rights, secured to plaintiffs in error by the Carmack Amendment, requires a reversal, is, we respectfully submit, ineluctable.

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JOHN K. GRAVES,
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FEBRUARY, 1914.

"APPENDIX."

"What the Other Prudent Men Did."

Possibly the best criterion whereby to judge the negligence *vel non* of the railroad is the action of other prudent men whose property was in the path of the flood. If those other prudent men, having the same information from the Weather Bureau as the railroad company, failed to save their property from the flood, this fact would strongly indicate that the danger could not reasonably be anticipated and that the loss of property in the possession of the carrier was not due to its failure to exercise due care. What the other people did, appears from the following testimony:

Hayhoe testified (p. 16):

> "I know of several instances of loss by the flood that looked as if people that had lived in Augusta for years did not anticipate for the reason that the Riverside Mills were almost completely ruined, the C. & W. C. Riverside yard was almost completely wiped out and several cars washed down the river. Several wholesale houses located in the heart of the city, for instance, Dicks', was badly damaged by the flood; Nixon's wholesale house was set on fire by lime, although when the water rose so rapidly they endeavored to move their goods to higher ground, but on account of the rapid rise of the water they were unable to do so. The water reached their lime, slacked it and

set fire to the building and several drowned trying to escape from the building. I know this because I was there and saw it."

Thompson swears (p. 24):

"We did not, however, at any time, think that the water would rise sufficiently high to get into the freight cars. When I left the Southern Railway yard, I did so in order to go to the assistance of my wife, mother, sister, and child, all of whom were in a house which was in the flood district, and when I reached home the water was within 3 or 4 inches of the floor and within an hour it was running several inches in the house. I had to move furniture, provisions, etc., to the second story, where we remained until the flood subsided. In my opinion nothing could have been done to save the freight in the cars because the water rose so rapidly and suddenly."

Anderson swears (p. 36):

"As a result of the above rain the streams and rivers in that neighborhood were very much swollen, in fact, to an extent greater than I have ever seen them before. Upon the Blue Ridge railroad we had seven or eight wash-outs and one trestle washed away. This trestle spanned a stream called Broadway Creek, was about 75 feet high and about 300 long. Rocky River, which traverses a considerable section of the country lying to the East of Anderson, was far out of its banks, and did considerable damage to property along its course."

Campbell swears (p. 39):

> "The rise of water was much more rapid in 1908, than I have ever known it before. The flood was more extensive, and did a great deal more damage than any other previous flood."

Martin swears (p. 41):

> "The bridges over the creeks which empty into Rocky River were all washed away. The railroad bridge across the Savannah River just below the mouth of Rocky River was also washed away. The Rocky River rose to a height to which it has never been before, and the rise was a great deal quicker and more sudden than it has ever been before. The whole country about was inundated. An immense island containing over 300 acres of land situated in the Savannah River just below the mouth of Rocky River was almost completely washed away. The flood was the most destructive that was ever known in the history of South Carolina. * * * The Rocky River was not nearly so high in 1888 as in 1908. There was a temporary railroad bridge across Rocky River in 1888, which was built about 8 or 10 feet above the level of said river. That temporary bridge was not submerged in 1888. In 1908, there was a bigger, better built, higher and stronger permanent bridge across Rocky River, which said bridge was entirely washed away."

Pfeiffer swears (p. 42):

> "The streams and rivers around Calhoun Falls all overflowed and were higher than I have ever seen them in my life. The water also rose more rapidly than I have ever seen it. At one time it rose 4 inches in 10 minutes. All the bridges and mill-houses on Rocky River were washed away."

Beale swears (p. 44):

> "I own an island in the Savannah River just below the mouth of Rocky River. This island comprises about 310 acres of land and its surface was about 10 feet above the level of the Savannah River. The great volume of water which poured out of Rocky River into the Savannah River and united with the already swollen waters of the latter river, washed away about 250 acres of the island above refered to. The rainfall at that time was greater than I have ever known it."

Parks swears (p. 45):

> "The river gauge, placed by the Government at this point, only registers a river of a maximum height of 37 feet, but at two o'clock, August 26, 1908, the Savannah River had risen to a height of three feet above said gauge.
>
> "I give this testimony from measurements made both by myself and a special government agent, authorized to investigate this fact. This rise of the Savannah River was by far the most rapid that I have ever known of."

W. F. Taylor swears (p. 49):

> "The weather conditions, upon the lower part of the river in 1908, were not such as to give warning of the flood that followed. I will also state that the rise of the Savannah River in 1908, was much more rapid than it was in 1888."

[23926]

18

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 615.

NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY, PLAINTIFFS IN ERROR,

vs.

NATIONAL RICE MILLING COMPANY,
DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF LOUISIANA.

BRIEF FOR PLAINTIFFS IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

J. BLANC MONROE,
Attorney for Plaintiffs in Error.

JOHN K. GRAVES,
Of Counsel.

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be found at transcript page 3 and reads as follows:

> "And petitioner further avers that section 7 of the act of Congress of June 29th, 1906, amending section 20 of the act of Congress of February 4th, 1887, provides:
>
> " 'That any common carrier, railroad or transportation company, receiving property for transportation from a point in one State to a point in another State, shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holders thereof for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed, provided that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.'
>
> "Petitioner further alleges that the New Orleans and Northeastern Railroad Company is, therefore, liable to it, jointly and *in solido* with the Southern Railway for its loss and damage resulting from the destruction of said rice."

Issue was joined on this petition, defendants claiming exemption from liability under the provision of the Carmack amendment as construed by this court. These claims were discussed by the Supreme Court of Louisiana and denied.

In the court of first instance the case was decided against the carriers. They appealed it to the Supreme Court, which reversed the decision of the court of first instance and dismissed the plaintiff's claim, handing down an opinion, the syllabus of which was prepared by the court and which reads as follows (Trans., p. 75):

"*Syllabus.*

> "Where, in an action to recover the value of goods entrusted to a carrier and destroyed in transit, it is shown that the proximate cause of the loss was an unprecedented flood, the burden of proof rests upon the plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise, by the carrier, of reasonable care and skill."

Plaintiff filed an application for a rehearing (Trans., p. 76), which opens with the following significant paragraph:

> "The gist of the Court's opinion is found in the syllabus which reads as follows:
>
> " 'Where, in an action to recover the value of goods entrusted to a carrier and destroyed in transit, it is shown that the proximate cause of the loss was an unprecedented flood, the burden of proof rests upon the plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise, by the carrier, of reasonable care and skill.' "

"This decision is based upon the following cases: Memphis *vs.* Reeves, 77 U. S., 176; Elam *vs.* St. Louis, etc., R. R., 93 S. W., 851; I. & G. N. R. R. *vs.* Gergman, 64 S. W., 999, but not a *single Louisiana decision is given,* though the contract in question was a Louisiana contract, and the forum a Louisiana court, and all the authorities on the conflict of laws hold that Louisiana law should govern. In so holding this honorable court has broken a rule founded on justice and common sense, and established by a long series of well-reasoned and abled [*sic*] decisions running from the 6 Martin to the 115 La. It has furthermore practically set aside paragraph 3 of article 1933, and article 2754 of the Revised Civil Code; and these decisions interpreting these articles."

Said petition for rehearing also contains the following paragraphs (Trans., p. 78):

"The court further erred in maintaining the following limitation of defendant's bill of lading:

" 'Neither this company nor any of its connecting carriers shall be liable for any damage to or destruction of said property by fire, unless such damage or destruction shall result directly and exclusively from their negligence or that of their employees, and unless such negligence shall be affirmatively established by the owner of said property.' * * *

"This restriction must be interpreted by Louisiana Law. (See Minor on Conflict of Laws, page 169.)"

The rehearing so prayed for was granted, and, after hearing additional oral argument, the Supreme Court of Louisiana reversed its former judgment and handed down the opinion which appears at Transcript, page 84 *et seq.*

The author of the original opinion filed a dissenting opinion (Trans., p. 99). From this opinion (at page 101) it appears that the court, on rehearing, refused to recognize the rule of law laid down in the syllabus of the original opinion, quoted *supra.*

In the opinion on rehearing the court used the following language (Trans., p. 94):

> "As relates to the Adams Express Co. *vs.* Croninger, 226 U. S., 148, on which reliance is placed, it does not appear that the rules of evidence have been changed by the interpretation laid down in that decision so as to shift the burden and to have the effect of nullifying the Civil Code of this State upon the subject.
>
> "The amendment known as the Carmack amendment invalidates the provisions of any State law nullifying contracts limiting the liability of a carrier for loss or damage to the agreed or declared value. The amendment is silent about evidence. There is a great difference between the 'agreed' value of freight, as set forth in the bill of lading, to be accounted for in case of loss and the onus of proof in case of loss of freight.
>
> "To return for a moment to the Croninger case above, it appears that, under the laws of Kentucky, the contract limiting the

> plaintiff's property to the 'agreed value' gave rise to the question at issue. The Federal Supreme Court held that the Carmack amendment of the interstate commerce act was controlling as relates to the value of property lost. The 'value clause' is expressly referred to in the decision.
>
> "We annex a copy of the amendment in the margin, containing all that there is upon the subject in the Federal interstate law. Not one word expresses the intention of repealing the rule fixing onus of proof under State statutes. Save that—as there are specimens—of the others. Patton *vs.* Pickles, 50 La. Ann., 857, and Spurlock *vs.* Traction Co., 118 La., p. 1.
>
> "There is no necessity of citing our decisions as they uniformly hold that the onus is with the defendant.
>
> "The State law should undoubtedly stand as it is, as it is not in conflict with Federal law or jurisprudence."

and, having thus concluded that the Louisiana jurisprudence, and not the Federal jurisprudence, was applicable, decided the case against the defendants. Defendants, thereupon, sued out this writ of error.

From the foregoing it appears that this litigation originally arose under the Constitution and laws of the United States; that the defendants in due time set up and claimed protection under those laws, claiming that their liability as interstate carriers was to be governed by the Federal statutes and jurisprudence and not by the State statutes

and jurisprudence; that when the Louisiana Supreme Court applied to the facts presented to it the rule of law laid down by the Federal statutes and jurisprudence it found for the defendant, but when it applied to those same facts the Louisiana rule it found for the plaintiff.

It further appears that the claim to protection under the Federal statutes and jurisprudence which was raised by the defendants was discussed by the Supreme Court of Louisiana in its final opinion and denied to the defendants; that because of this denial judgment was entered against them.

The Louisiana court *actually applied* to this case the Federal rule, and actually reversed the decision of the lower court in favor of the plaintiff. Thereafter, on rehearing, it applied the Louisiana rule and held the defendants liable. Under these circumstances defendants sought redress on writ of error from this court, assigning the infringement of rights granted to them under designated articles of the Federal Constitution and provisions of the Interstate Commerce Act, in the following particulars (abbreviating the assignments of error and giving substance thereof) (Trans., p. 112):

That the Supreme Court of Louisiana erred:

1. In failing to hold that defendants were entitled to have their liability determined by the provisions of the Carmack amendment and by the Federal jurisprudence.

2. In holding that the defendants obligations were governed by the State jurisprudence.

3. In failing to hold that the Interstate Commerce Act as amended has withdrawn the question of liability of interstate carriers for interstate freight from the domain of State law and made it subject solely to Federal jurisprudence.

4. In failing to hold (what the Federal jurisprudence expressly recognizes, Railroad Co. *vs.* Reeves, 10 Wall., 176), that when the carrier shows that the proximate cause of the loss is an act of God, the burden of proof shifts to the claimant to show that notwithstanding said act of God, the carrier could, with due care, have preserved the shipment.

5. In holding that, after it has shown destruction of an interstate shipment by an act of God, the onus of proof remains on the interstate carrier to show itself free from negligence.

6. In holding the Louisiana statutes to be the rules whereby to govern the liability of an interstate carrier carrying an interstate shipment in a case where said statutes are at variance with the Federal jurisprudence.

7. In failing to hold the following stipulation of the bill of lading sued on by the defendant in error to be binding upon it, to wit:

> "Neither this company nor any of its connecting carriers shall be liable for any damage to or destruction of said property by fire, unless such damage or destruction shall

result directly and exclusively from their negligence and that of their employees, and unless such negligence shall be affirmatively established by the owner of the said property."

thus denying to plaintiffs in error the benefit and protection of the Carmack amendment.

8. In holding invalid the clause of the bill of lading providing that the shipper must affirmatively prove negligence on the part of the carrier in order to charge the latter with liability for a shipment destroyed by act of God.

9. In holding that the plaintiff in error, Southern Railway Company was bound to prove an allegation of its answer to the effect that it was free from negligence.

10. In holding that the alleged negligence of the plaintiffs in error, or either them, was the proximate cause of the loss, whereas under the application of the Federal statutes and jurisprudence to the facts, same was not and could not have been the proximate cause of such loss.

11. In failing to hold that the plaintiffs in error were liable under the Carmack amendment only for loss or damage "caused by" them or either of them."

12. In holding that the loss in question was "caused by" the defendant carriers or either of them within the meaning of the Carmack amendment.

ARGUMENT.

Defendant in error moves to dismiss the writ thus sued out on three grounds, which he states as follows:

(*a*) Because the sole issue in the case is an issue of fact.

(*b*) Because the Federal question is frivolous.

(*c*) Because the judgment of the lower court rests upon a question of general law, broad enough to sustain it, and the decision of the so-called Federal question is unnecessary.

We challenge the statement of counsel on this point sharply.

Is the Sole Issue in the Case an Issue of Fact?

We challenge this statement sharply.

The sole issue in our judgment is an issue of law. That issue is: Is the Federal rule of liability to be applied to this case, or must the State rule be applied?

The Supreme Court of Louisiana applied both rules. When it applied the Federal rule, it decided the case in favor of the defendant carriers. When it applied the State rule it decided in favor of the plaintiff. It thus conclusively demonstrated that the material issue in this case is a question of law and not of fact.

If the Federal jurisprudence is applied to this case, the rule by which the court will be governed will be that laid down in Memphis R. R. Co. *vs.* Reeves, 10 Wall., 176, which rule is stated in the head-note to that case as follows:

> "Where a common carrier shows that a loss was by some *vis major*, as by flood, he is excused without proving affirmatively that he was guilty of no negligence."

This case has been conceded by counsel for defendant in error to correctly state the rule of law as applied in the Federal courts.

This rule, the Supreme Court of Louisiana, in its final opinion expressly refused to apply to the case at bar. It says (Trans., p. 94):

> "As relates to the Adams Express Co. *vs.* Croninger, 226 U. S., 148, on which reliance is placed: It does not appear that the rules of evidence have been changed by the interpretation laid down in that decision so as to shift the burden and to have the effect of nullifying the Civil Code of the State upon the subject. * * *
>
> "There is no necessity of citing our decisions, as they uniformly hold that the *onus* is with the defendant. The State law should undoubtedly stand as it is, as it is not in conflict with the Federal law or jurisprudence."

Counsel's brief seeks to create the impression that while the Supreme Court of Louisiana refused to apply to this case the rule laid down in the

Reeves case, it went further and held that even were that rule to be applied the facts would be against the carriers. A reading of the very quotation cited to support this view, refutes this contention. The quoted passage, after reviewing the evidence, says (Trans., pp. 92, 93):

> "The cars were ready to be hauled away; *no one testified* why they were not hauled to destination. * * * There was an engine and crew in the yard; they were not timely called upon to prevent the loss, *or if called, it is not proven.*" * * *
>
> "This is the impression created by the evidence. If it were different, if those in authority and those under their orders on the occasion were sufficiently active, the *evidence on the subject is weak and not convincing.*" (Italics by present writer.)

At page 86 the opinion says:

> "The cause of the delay of these cars in Augusta is not explained."

That is to say, the Louisiana court holds not that the plaintiff has proven negligence in the carriers, but that the carriers have failed to show that they were not negligent. Reflect a moment that this same court, in its original opinion had applied the Reeves doctrine and had held that the burden was on the plaintiff to show negligence on the part of the carriers; that when it applied that rule of law, it found the carriers not liable. Add this to their above language, and the mind cannot fail to be-

come convinced that in their second opinion, the Supreme Court of Louisiana strictly confined itself to holding that the carriers *had not proven* themselves free from negligence.

But as a matter of law, under the Federal jurisprudence, no such burden rested upon them. And as a matter of right, under the Federal Constitution and statutes, the carriers were entitled to the protection afforded by the Federal jurisprudence. This court has said in the Croninger case, 226 U. S., 491, that in enacting the Carmack amendment, Congress desired to do away with the old chaotic condition under which the rights and obligations of an interstate carrier while moving an interstate shipment, changed every time that shipment crossed a State line, and to substitute therefor one unchanging liability, which liability should be the rule of liability and conduct laid down by the Federal jurisprudence. This court says (pp. 505-6):

> "That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it."

The Supreme Court of Louisiana says (Trans., p. 94):

> "As relates to the Adams Express Co. *vs.* Croninger, 226 U. S., 148, on which reliance is placed: It does not appear that the rules of evidence have been changed by the interpretation laid down in that decision so as to shift the burden and to have the effect of nullifying the Civil Code of this State upon the subject."

And at page 92:

> "The code, art. 2754, clearly states that in order to be relieved from liability, the carrier must prove 'that such loss or damage has been occasioned by accidental and uncontrollable event.' *They failed to prove ordinary care.*" (Italics by Court.)

Again (p. 92):

> "The law requires him (the carrier) to prove the uncontrollable event which he alleges."

That the Carmack amendment takes the subject matter without the domain of State law and places it within the realm of the Federal law is declared in so many words in the Croninger case. And that the Federal law places the burden of proof upon the plaintiff to show negligence after the carrier has proved that the loss or damage was caused by an act of God, is settled in the Reeves case; yet notwithstanding the express decisions by this

tribunal to the contrary, the State court insists that the regulations and policies of a particular State are not superseded; it refuses to measure the liability of an interstate carrier by the Federal yardstick, but insists upon measuring it by the State standard. It refuses to recognize the Federal law, which says that the carrier need not prove affirmatively that he was guilty of negligence, and insists upon the State rule, which holds that the carrier *must make* that affirmative proof, and because it applies the State rule, and *only for that reason,* finds the carrier liable. And when the carrier applies to this court for redress, it is met with the argument that only a question of fact is involved. We submit that this contention is based upon a fundamental misunderstanding of the issue and should be overruled. If a question of fact only were involved, this case could not be used as a precedent. But, if allowed to stand, the decision in this case will force interstate carriers in all future cases to assume a burden of proof which the Federal jurisprudence does not impose upon them. This being so, it cannot even plausibly be contended that a question of fact only is involved.

We may also remark that it is not necessary for us in this brief to convince the court that the judgment was controlled by an erroneous decision as to the Federal law, for the question of whether the judgment was controlled by the facts independently of any question of law or of the construction of the Federal act, is one to be determined after

oral argument and not upon motion to dismiss. Baltimore & Ohio R. Co. *vs.* Maryland, 20 Wall., 643.

In Kansas City Southern Ry. Co. *vs.* Albers Com. Co., 223 U. S., 573, this court declares (p. 591):

> "While it is true that upon a writ of error to a State court we cannot review its decisions upon pure questions of fact, but only upon questions of law bearing upon the Federal rights set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter."

And at p. 594:

> "When due regard is had for the rule before indicated, and so often applied in other cases, it does not admit of doubt that in the present case we may examine the evidence which has been properly incorporated in the record, to determine whether the general finding necessarily involved the decision of questions of law bearing upon the Federal right set up by the garnishee. And when this is done it is manifest, as is amply illustrated by the résumé which we have given of the evidence and contentions of the parties, that the finding necessarily involved the decision of questions of the inter-

pretation and application of the Interstate Commerce Act (24 Stat., 379, c. 104; 25 Stat., 855, c. 382), and also of other questions of law bearing upon the Federal right, *such as the legal effect of evidence.*

At page 592:

> "In Schlemmer *vs.* Buffalo, Rochester & Pittsburg Ry. Co., 205 U. S., 1, a case arising under the Federal Safety Appliance Law, wherein the State court found that the deceased contributed to his injury by his own negligence, thereby preventing a recovery, this court exercised the power to examine the evidence, notwithstanding a contention that the finding was conclusive, and reversed the judgment upon the ground that it appeared that what had been found to be contributory negligence was at most an assumption of the risk, which was not a defense under the Federal statute."

In the same case the court refers to the case of Stanley *vs.* Schwalby, as follows (pp. 591-2):

> "In Stanley *vs.* Schwalby, 162 U. S., 255, 274, 277-279, which was an action of ejectment, the validity of an authority exercised under the United States was drawn in question and depended upon whether the United States had a good title to the land in controversy. That question turned upon whether the attorney for the United States, who had represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the State court found that he had such knowledge. In this court it was

> insisted on the one hand that the finding was conclusive, and on the other that the evidence was insufficient, as matter of law, to warrant the finding, and could be examined to determine whether this was so. In that connection this court, although recognizing the general rule that findings upon pure questions of fact are not open to review, said (p. 278): 'But so far as the judgment of the State court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.' And, upon examining the evidence, this court held it to be 'wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan,' and accordingly reversed the judgment of the State court."

In Dower *vs.* Richards, 151 U. S., 658, the court said (p. 667):

> "When, indeed, the question decided by the State court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice Catron: 'The powers of the Supreme Court are limited in cases coming up from the State courts, under the twenty-

fifth section of the judiciary act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, &c., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a State court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decision of State courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a State, when reversing the proceedings of the inferior courts of original jurisdiction.' Mackay *vs.* Dillon, 4 Howe, 421, 447. The only question of evidence considered in that case arose upon a bill of exceptions to the legal competency of evidence relied on to prove a title under an act of Congress."

And in Acme Harvester Co. *vs.* Beekman Lumber Co., 222 U. S., 300, 305, this court declared:

"The alleged finding of fact that the jurisdiction of the Federal court had ended cannot conclude this court in reviewing a

> question of this character. The defendant asserted the power and jurisdiction of the Federal court, invoked before the beginning of the State proceedings, and alleged its sufficiency to protect it against further proceedings in the State court. The right of ultimate determination of a contention of that character in this court cannot be defeated by the finding of the State court that the Federal court had exceeded or ended its jurisdiction. The determination of a question of that kind is not a finding upon a disputed question of fact, nor within that class of cases in which this court has repeatedly held that the facts as found in the State court would be regarded as conclusive here."

See the case of Creswill *vs.* Grand Lodge Knights of Pythias of Georgia, 225 U. S., 246, where it was said (p. 261):

> "While it is true that upon a writ of error to a State court, we do not review the findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (*a*) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support and the evidence is in the record the resulting question of law is open for decision; and (*b*) that where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent

> necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right."

In Schlemmer *vs.* Buffalo, &c., Ry. Co., 205 U. S., 1, this court said (p. 11):

> "We certainly do not mean to qualify or limit the rule that, for this court to entertain jurisdiction of a writ of error to a State court, it must appear affirmatively that the State court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. Bachtel *vs.* Wilson, January 7, 1907, 204 U. S., 36. But on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact, involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it. Kaukauna Water Power Co. *vs.* Green Bay & Mississippi Canal Co., 142 U. S., 254. And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. Terre Haute & Indianapolis Railroad Co. *vs.* Indiana, 194 U. S., 579."

In that case, the court looked closely into the evidence to determine whether it appeared therefrom that the State court in holding that the plaintiff's intestate was chargeable with contributory negligence had not denied to the plaintiff the benefit of the Federal Safety Appliance Act which took away the defense of assumption of risk, and the analysis

of the evidence resulted in a reversal of the judgment of the State court.

Is the Federal Question Frivolous?

We have endeavored to make clear in the foregoing discussion that upon the Federal question raised, and the shield of the Federal law invoked, this whole case hinges. Because that shield of Federal law guaranteed to the interstate carrier by the Constitution of the United States and the statutes enacted in pursuance thereof by the Federal Congress has been denied them, plaintiffs in error have been condemned to pay a goodly sum. If the protection of that shield is afforded them, they will escape liability. How then can it fairly be said that the Federal question is frivolous?

It is not correct to state that the original pleadings raised no Federal question, since the plaintiff especially invoked and quoted the Interstate Commerce Act in his original petition, the very first pleading filed in the litigation. Nor is it correct to state that no reference is made in the first opinion of the Supreme Court of Louisiana to the Federal law, since that tribunal expressly based its holding and finding upon the opinion of the Supreme Court of the United States in the Reeves case (Trans., p. 75), the court taking it for granted that the same was applicable.

We are at a loss to understand how counsel can make such an assertion, when he himself com-

plained in his application for a rehearing (Trans., p. 76), that the court had based its findings on the Federal and not on the State law. His exact language is as follows:

> "This decision is based upon the following cases: 'Memphis *vs.* Reeves, 77 U. S., 176; Elam *vs.* St. Louis, &c., R. R., 93 S. W., 851; I. & G. N. R. R. *vs.* Gergman, 64 S. W., 999;' but not a single Louisiana decision is given, though the contract in question was a Louisiana contract, and the forum a Louisiana court, and all the authorities on the conflict of laws hold that Louisiana law should govern. In so holding this honorable court has broken a rule founded on justice and common sense, and established by a long series of well-reasoned and able decisions running from the 6 Martin to the 115 La."

On rehearing, the court reached the conclusion that the State law and not the Federal law was applicable, and because it reached that conclusion reversed its own decision. The dissenting opinion points out quite clearly (Trans., p. 101), that the decision of the case turned on the question of the law applicable. It says in fact:

> "In the opinion, on rehearing, it is said:
> " 'According to (the law) and jurisprudence of this State, to be relieved from liability the carrier must prove that the loss or damage has been occasioned by an accidental or uncontrollable event, and this involves the proposition that the carrier must prove that it was free from fault.'

> "From the paragraph thus quoted, and from the opinion on rehearing, taken as a whole, I infer that the majority of the court now question the correctness of the proposition above quoted from the original opinion, and I shall venture to add a few words upon that issue."

It quotes at length from the opinion of this court in Adams Express Co. *vs.* Croninger, and says (Trans., p. 104):

> "The rights and liabilities of the parties to this suit are, therefore, to be determined according to the jurisprudence of the Federal courts at the time the suit was brought. The question, then, is, does that jurisprudence sustain the proposition, as stated in the syllabus of the original opinion herein, that, 'Where in an action to recover the value of goods entrusted to a carrier and destroyed in transit, it is shown that the proximate cause of the loss was an unprecedented flood, the burden of proof rests upon the plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise, by the carrier, of reasonable care and skill?' "

Counsel for defendant in error state in their brief (pp. 6-7) that: "On rehearing, for the first time, defendants contended that they were not liable under the Carmack amendment." If they mean by this to contend that (even assuming that no Federal question was raised prior to the rehearing) this court will not review the determination

by the State court of a Federal question first presented on rehearing, the contention is shown to be without merit by several decisions of this court. Mallett *vs.* North Carolina, 181 U. S., 589; Leigh *vs.* Green, 193 U. S., 79. We quote from the opinion of the court in the case last cited (p. 85):

> "A motion is made to dismiss because the claim of impairment of a right secured by the Fourteenth amendment was not made in the courts of Nebraska until the motion for rehearing was filed in the Supreme Court. We are unable to discover a specific claim of this character made prior to the motion for rehearing. In the motion reference is made to the failure of the Nebraska Supreme Court to decide the claim heretofore made, that the statute of Nebraska was unconstitutional because of the alleged violation of the right to due process of law guaranteed by the Fourteenth amendment to the Constitution of the United States. Be this as it may, the Supreme Court of Nebraska entertained the motion and decided the Federal question raised against the contention of the plaintiff in error. In such case the question is reviewable here, although first presented in the motion for rehearing. Mallett *vs.* North Carolina, 181 U. S., 589."

Does the Judgment of the Lower Court Rest Upon a Question of General Law, Broad Enough to Sustain It, so That the Decision of the Federal Question is Unnecessary?

Under this head, our discussion under the first head, and the authorities there set forth, are pertinent and we beg to refer the court thereto so as to avoid repetition.

The question of whether the burden of proof was upon the plaintiffs in error, after they had shown that the destruction of the goods was due to an act of God, to prove that they were guilty of no negligence contributing to the loss, involving the question whether the carrier "caused" the loss ceased to be one of general law when the Carmack amendment went into force. That enactment of Congress took the question of what principles should be applied in determining the liability of the carrier out of the field of general law and placed it within the domain of Federal law. Adams Express Co. *vs.* Croninger, 226 U. S., 491. By virtue of the Carmack amendment, Federal rights are secured to the plaintiffs in error, which before that enactment did not exist. We are by virtue of said Federal enactment entitled to a review by this court and a decision of questions which before that act was passed the State courts could finally determine. The difference between the situation as it existed before the passage of the

Carmack amendment and the present situation is strikingly illustrated by a comparison of the decision of this court in Pennsylvania Railroad Co. *vs.* Hughes, 191 U. S., 477, with its decision in the Croninger case. In the Carmack amendment inheres the Federal jurisprudence, that is, the law as it obtains in the Federal courts (Croninger case) and by virtue of that amendment there is secured to plaintiffs in error, by Congressional enactment, the right to have their liability determined in the situation here presented, solely according to the rules of Federal law.

It will not avail to say that the State court might have found the plaintiffs in error liable even though the Federal law had been applied. The State court did, in fact, whether by erroneously construing the Federal law or by refusing or failing to apply it, deny to plaintiffs in error rights secured to it thereunder by virtue of the Carmack amendment. The court did, in fact, consider and expressly pass upon the contention of the plaintiffs in error, that they had been denied rights under the Federal law, and overruled the contention. That is quite enough to give this court jurisdiction and if the plaintiffs in error are to obtain rights accruing to them under a Federal statute, this court must take jurisdiction.

In this connection, we quote from the opinion of this court in Henderson Bridge Co. *vs.* Henderson, 173 U. S., 592, 608-9:

"If the State court had sustained the city's plea of *res adjudicata* upon some ground that did not necessarily involve the determination of a Federal right, it might be that the present case would come within the rule, often acted upon, that this court in reviewing the final judgment of the highest court of a State will not pass upon a Federal question, however distinctly presented by the pleadings, if the judgment of the State court was based upon some ground of local or general law, manifestly broad enough in itself to sustain the decision independently of any view that might be taken of such Federal question. But that rule cannot be applied to the judgment below. Upon examining the opinion of the Court of Appeals of Kentucky in this case we find that that court expressly waived any decision upon the plea of *res adjudicata*, for the reason that some views were then pressed upon its attention that had not been presented in previous cases, and it reconsidered and discussed the main question suggested by the defense, namely, that the Constitution of the United States forbade the assessment of that part of the bridge property between low-water mark on the Kentucky shore and low-water mark on the Indiana shore of the Ohio River. This court therefore has jurisdiction to review the final judgment of the State court for the purpose of ascertaining whether it deprived the defendants of any right, privilege or immunity specially set up by them under that instrument."

The State court's decision, as is plainly shown by its opinion on rehearing, as we have pointed out under the first heading, is based upon the funda-

mental error that the burden to negative the existence of negligence contributing to the loss caused by act of God was upon the carriers. This error was an error of law, and an error in misinterpreting or failing to apply the Federal law. This error goes to the root of the decision and its correction will destroy the decision. The application of the doctrine of the Schlemmer case, 205 U. S., 1, *supra*, requires a review by this court.

The State court, as we have seen, after the first hearing, applied the Federal rule and decided in favor of the plaintiffs in error. Thereafter, upon rehearing, it expressly considered the Federal question insisted upon by plaintiffs in error, and decided it against them. One of the judges dissented, upon the ground that the case was controlled by Federal law and that under that law a case had not been made out.

Can it then be argued with any plausibility that under the principles governing motions to dismiss or affirm (Baltimore & Ohio R. Co. *vs.* Maryland, 20 Wall., 643), this case is not one wherein plaintiffs in error are entitled to a review by this court after hearing oral argument upon our contention that the judgment operates to deprive plaintiffs in error of rights secured to them by act of Congress?

Respectfully submitted,

J. BLANC MONROE,
Attorney for Plaintiffs in Error.

JOHN K. GRAVES,
Of Counsel.

19

United States Supreme Court.

OCTOBER TERM, 1913.

Office Supreme Court, U.
FILED
FEB 25 1914
JAMES D. MAHER
CLE

No. 615.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY AND THE SOUTHERN RAILROAD,
Plaintiffs in Error,

versus

NATIONAL RICE MILLING COMPANY,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR AND ON THE MERITS.

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ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR AND ON THE MERITS.

Having been informed by the Clerk of this Honorable Court that your Honors will consider this case both on the motion to dismiss or affirm and on the merits, we wish to

add to our brief on that point a short reply to the argument of plaintiffs in error, as we did not have their brief when ours was prepared.

Plaintiffs in error, on page 7 of their brief, in opposition to the motion to dismiss or affirm, say:

> "The Louisiana Court actually applied to this case the Federal rule, and actually reversed the decision of the lower Court in favor of the plaintiff (defendant in error). Thereafter, on rehearing, it applied the Louisiana rule and held the defendants (plaintiffs in error) liable."

We take issue with the able attorneys of plaintiff in error on this statement. In its original opinion, April 22, 1912, the Supreme Court of Louisiana (Tr., p. 64) said:

> "Defendant examined twenty-three witnesses under commissions."

The Court then reviews the evidence, making many quotations therefrom, and on page 75 of the record said:

> "It being established beyond controversy that the proximate cause of the loss complained of was an unprecedented flood, which, standing alone, is a sufficient defense to this action, we are of the opinion that the burden of proof rested upon plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise by the defendants of reasonable care and skill. (*Memphis vs. Reeves*, 77 U. S. 176; *Elam vs. R. R.*, 93 S. W. 851; *R. R. Co. vs. Bergman*, 64 S. W. 999.) Plaintiff has, however, not attempted to carry that burden, save by the cross-examination of defendant's witnesses; and, for the reasons assigned, we do not think the attempt, as thus made, successful."

As plaintiffs were in New Orleans, La., at the time of the destruction of the rice in South Carolina, in the possession of the railroad companies, the plaintiffs necessarily were obliged to rely on the cross-examination of defendants' twenty-three witnesses.

This necessity has been recognized by this Court in *G., H. & S. F. Ry. Co. vs. Wallace*, 223 U. S. 481, where Justice Lamar said:

> "The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier, and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof."

Apparently the author of the first opinion, while finding some evidence of negligence, did not think that negligence sufficient to meet the requirement of the rule in the *Memphis R. Co. vs. Reeves case*, and, therefore, reversed the judgment.

We must admit the first contention of plaintiff in error, **but we deny emphatically his second contention, that the application of the Louisiana rule on rehearing caused the reversal of the original judgment rendered by the Supreme Court of Louisiana.** We contend that judgment was reversed because the Court found the carriers negligent in **at least five particulars** from the evidence in the record, under both the Federal and State rules, and that the opinion is unmistakably clear and emphatic on this point.

In supporting his second contention, plaintiff in error makes much of the fact that defendant in error sharply at-

tacked this application of the Federal rule in the beginning of the petition for rehearing. The petition for rehearing did open with the paragraph referred to on page 3 of the brief of plaintiffs in error, and this was one of the reasons for requesting a rehearing; but a reading of that petition will show that a rehearing was also asked for other reasons, and especially for the reason that the Court had erred in its finding of fact, **as the evidence in the record showed that plaintiffs in error were negligent, and that their negligence, combined with the flood, caused the destruction of the rice.**

A rehearing was granted without reasons (Tr., p. 82), and on the 5th day of March, 1913, the case was reargued orally and submitted (Tr., p. 83) to the Court.

On April 14th the Court rendered its opinion and judgment on rehearing. (Tr., p. 84.) The Court in its opinion (Tr., p. 85) said:

"Many of the issues are of fact."

The Court then reviews the testimony in the record, making numerous quotations from the testimony (see Tr., pp. 85, 86, 88, 89, 91), and said:

> **"From all this evidenec, we are led to the infreence, which we think is positive, that there was negligence. A little timely activity would have brought about a different result, and would have saved plaintiff's property, or would have placed defendant in a position to successfully defend themselves.**
>
> "From the first there is evidence that the trestles were unsafe, prematurely weak, so much so that in the early rise they were washed away. Trees and lumber were allowed to bank up as they drifted down against these trestles; nothing was done to relieve

> the situation at this point, although trees were pressed down the current, passing under and undermining the trestles. A former employee came to the place and saw the danger; he moved away the banked-up debris as well as he could, though he was not in the employ of the defendant. When asked why he had worked as he had, his reply was that he wished to help the companies. He, the former employee, worked to save property, but the railroad people did nothing to move away this obstruction. The employees were not as mindful of the necessity of taking care of freight as they should have been. They thought it may be that the waters would not rise sufficiently high to get into the freight cars. In this they assumed too much. The reports received in regard to the flood did not justify that assumption. The cars were ready to be hauled away; no one testified why they were not hauled to destination."

It will be noted, therefore, that the Court said:

> "From all the evidence we are led to the inference, which we think is positive, that there was negligence."

It follows, therefore, that the Court on rehearing found from the evidence in the record that the defendant railroad companies were negligent, and the Court, therefore, did not base its decision upon any rule as to the onus of proof.

On page 93 of the record the Supreme Court of Louisiana further said:

> "On the rehearing only, the contention is that the suit is to be governed by the Carmack amendment to the Interstate Commerce Act, interpreted in the *Croninger case*, 226 U. S. 148. But, if it is to be governed by that decision, defendant would not be in a much better position. * * *

> "Admitting, for a moment, all that is claimed under the Carmack amendment, under any laws of this country, indifferent railroad people, who receive freight to be transported some distance, and who, just before the waters of a storm have flowed down, stop the cars on the way, and run them to the lowest part of their yards, and place them next to cars loaded with quicklime, easily ignited by water, and leave them at that place, while other cars are taken out, and make no attempt to haul them out, although the waters are rising slowly enough for such work after warning given, are not protected from the charge of negligence under the law. The decision in *Railroad Co. vs. Reeves*, 10 Wallace, 197, cited by defendants, is not determinative of the issues, considered from any point of view. In the last cited case, reviewing another decision, this Court, through Justice Miller, said, in substance, that the law requires some skill and forethought of carriers. If judged from that point of view exclusively, the carrier is not excused, unless he shows some activity in protecting property in case of necessity."

It will be noted that the Court held that the defendants were negligent under the evidence in the record. If everything said in the decision relative to the burden of proof was eliminated therefrom, the opinion and judgment would not be in the least affected. It will be borne in mind that the Court said: "From all this evidence [the evidence quoted in the record], we are led to the inference, which we think is positive, that there was negligence." The learned counsel for plaintiffs in error were, therefore, mistaken when they said that the Court in its original opinion applied the Federal rule as to the burden of proof and reversed the decision of the lower Court, and that thereafter,

on rehearing, it applied the Louisiana rule and held the defendants liable. We repeat that the decision of the Supreme Court of Louisiana holds the defendant carriers liable on the sole ground that the evidence in the record, which is referred to by the Court, shows positively that the defendants were negligent.

The decision of the Supreme Court of the State was, therefore, based on **a principle of general law broad enough to sustain the decision,** and this Court will not take jurisdiction.

Arkansas So. R. R. Co. vs. German Bank, 207 U. S. 270; *Eustis vs. Bolles,* 150 U. S. 361.

But suppose we concede, for the purpose of argument, that the Supreme Court of Louisiana reached a conclusion by following a State rule as to the burden of proof, and that the State rule differs from the Federal rule. We submit that, under the well-settled jurisprudence of this Court, findings of the Supreme Court of Louisiana upon questions of fact are not open to review.

Waters-Pierce Oil Company vs. Texas, 212 U. S. 86; *Chrisman vs. Miller,* 197 U. S. 313.

In *Minn. & S. L. Ry. Co. vs. Minnesota,* 193 U. S. 53, where the District Court in Minnesota had found as a fact that a station-house was needed at Emmons, and the Supreme Court of the State divided equally on the question (two Judges affirming and two reversing), this Court said, through Mr. Justice McKenna, on page 64 of the opinion:

> "The charge is that the property of plaintiff in error is taken without due process of law, but whether so taken is made to depend upon a question of fact, the requirement of 'an unnecessary and wholly useless expenditure of money.' It is well es-

tablished that on error to a State court this Court cannot re-examine the evidence, and when the facts are found we are concluded by such finding. (*Egan vs. Hart,* 165 U. S. 188.) But in the case at bar we are met by the circumstance that the Supreme Court equally divided on the question whether the facts distinguish this case from 76 Minnesota, 469. The plaintiff in error, therefore, contends that there has been no judgment of the Supreme Court on the facts and they are open to review here. The contention is not tenable. There is no statement of facts by the Supreme Court, and its decision, though by a divided court, constituted an affirmance of the finding of the District Court."

The plaintiffs in error cite several cases in which this Court has, upon a writ of error to a State court, reviewed its findings upon questions of fact; but in all the cases **rests entirely and exlcusively on the fact, as stated by that Court in its opinion** (Tr., p. 91), **"From all this evidence,** whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. As the decision of the Supreme Court of Louisiana rests entirely and exclusively on the fact, as stated by that Court in its opinion (Tr., p. 91), **"From all this evidence, we are led to the inference, which we think is positive, that there was negligence"** (black-letter ours), this Honorable Court will not review this finding of fact, as the question of negligence *vel non* involves no right under a Federal statute.

The question of negligence *vel non* being one of fact, and the Supreme Court of Louisiana having rested its de-

cision on that point entirely, its judgment is conclusive or this Honorable Court.

Railroad Company vs. Brewer, 231 U. S. 245-249; *Waters-Pierce Oil Company vs. Texas*, 212 U. S. 112-116; *Minneapolis & St. L. R. Co. vs. Minnesota*, 193 U. S. 53.

The only complaint that plaintiff in error has to make is that the Supreme Court of Louisiana made a mistake in holding that the railroad companies were negligent. To hold that the Supreme Court of the United States has jurisdiction to review the conclusions reached by the Supreme Court of the State on the question of negligence would be to make the Supreme Court of the United States a court of review for the errors of the Supreme Court of Louisiana; that is, would make it the judge of the correctness of the decisions of the Supreme Court of Louisiana in every case in which the litigants chose to carry the decisions of the Supreme Court of Louisiana to this Court on an averment that the Supreme Court of Louisiana had erroneously decided the same.

In *Central Land Company vs. Laidley*, 159 U. S. 103, Mr. Justice Gray said:

> "When parties have been fully heard in a regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States."
>
> *Walker vs. Sauvinet*, 92 U. S. 90; *Heard vs. Amoskeag*, 113 U. S. 9, 26; *Morly vs. R. R.*, 146 U. S. 162, 171; *Bergman vs. Backer*, 157 U. S. 655; *New Orleans Waterworks*

Company vs. La. Sugar Refining Co., 125 U. S. 38; *Bacon vs. Texas*, 163 U. S. 207.

In *Bank vs. Buckingham*, 5 How. 317, 343, and *Lawler vs. Walker*, 14 How. 149, 154, this Court said:

> "It is the peculiar province and privilege of the State Courts to construe their own statutes; and it is no part of the function of this Court to review their decisions, or assume jurisdiction over them, on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of errors committed by their judiciary."

In *Knox vs. Exchange Bank*, 12 Wall. 379, 383, it was held:

> "We are not authorized by the judiciary act to review the judgments of the State Courts because their judgments refuse to give effect to valid contracts, or because their judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court would be brought here, where the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held."

The same doctrine was stated by Mr. Justice Harlan, speaking for this Court, as follows, in *Leigh Water Co. vs. Easton*, 121 U. S. 388, 392:

> "The State Court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinion is

> void; or its interpretation of the contract may, in our opinion, be radically wrong; but in neither such cases would the judgment be reviewable by this Court."

The Supreme Court of Louisiana having held the railroad companies liable on account of their negligence, it follows that there is no Federal question involved, and this Court will dismiss the writ of error.

It is further contended by the learned attorney for plaintiffs in error that, this being an interstate shipment, the right and liability of the railroad companies must be determined by the provisions of the Carmack Act; that the Supreme Court of Louisiana held under the State statutes that the burden of proof was upon the railroad companies to show that the destruction of the two cars of rice was not only caused by an act of God, but that it was the entire cause—*i. e.*, there was no act of negligence on the part of the carrier which brought about the injury, and that this ruling of the Supreme Court was contrary to the Federal jurisprudence, which holds that the carrier need only show that the property was destroyed by the act of God. The Federal jurisprudence, as we understand it, is that before a common carrier can escape liability on the ground of the act of God, it must show that this was the entire cause. See *The Majestic*, 166 U. S. 376, where this Court said:

> "The act of God, said Chancellor Kent (Vol. 2, p. 597), means 'inevitable accident, without the intervention of man and public enemies'; and again (Vol. 3, p. 216), that 'perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined in the civil law to be, *quod damno fatali con-*

tingit, cuivis diligentissimo possit contingere. It is a loss happening in spite of all human effort and sagacity.' The words 'perils of the sea' may, indeed, have grown to have a broader signification than 'the act of God,' but that is unimportant here.

"Judge Shipman in the Court of Appeals quotes from Parsons on Shipping, 255, the definition there given of the 'act of God,' and the reason for it, as follows: 'The "act of God" is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency in causing the loss; for, if this were possible, he should be held.'

* * * * * * * * *

"In our opinion the steamship company failed to show that the accident was one which could not have been prevented by human effort, sagacity and care, and we perceive no reasonable ground for disagreeing with the judgment of the District Court upon the facts."

See, also, *The Cape Charles,* 189 Fed. 846.

But suppose it were otherwise, and suppose the Supreme Court of Louisiana erred as to where the burden of proof rested—whether upon the railroad company to show that the destruction was due entirely to the act of God or upon the plaintiff to show the negligence of the carrier—how can it affect the situation? The fact remains that, from the evidence in the record, the Supreme Court of Louisiana concluded that the railroad companies were negligent in many respects. This is evidenced from the following language taken from the opinion of the Supreme Court of Louisiana:

"Admitting for a moment all that is claimed under the Carmack Amendment—Under any of the

> laws of this country, indifferent railroad people, who receive freight to be transported some distance and who just before the waters of a storm have flowed down stop the cars on the way and run them to the lowest part of their yards and place them next to cars loaded with quicklime, easily ignited by water, and leave them at that place while other cars are taken out, and who make no attempt to haul them out, although the waters are rising slowly enough for such work after warning given, are not protected from the charge of negligence under the law."

It is evident that the Supreme Court of Louisiana, instead of refusing to follow the Carmack Amendment, did follow it, and concluded from the evidence in the record that the defendants' negligence in conjunction with the act of God caused the destruction of the two cars of rice. If everything that was said in the opinion relative to the burden of proof was eliminated from the opinion, it would not in the least affect the judgment, which is based entirely upon the negligence of the defendants found from the evidence in the record.

ON THE MERITS.

Statement of Facts.

On August 21 and 22, 1908, the National Rice Milling Company, the defendant in error, delivered at New Orleans, La., to the New Orleans and Northeastern Railroad Company, plaintiff in error, to be transported to Charleston, S. C., respectively, three hundred and four hundred pockets of clean rice. (See bills of lading, Tr., p. 4.) The rice was destroyed by fire at Hamburg, S. C., while en route, in the

possession of the Southern Railway Company. The present action was brought against the Southern Railway Company and the New Orleans and Northeastern Railroad Company, *in solido*, to recover $2,487.50, its value. The Southern Railway Company was made a party because the destruction of the rice was due solely to its alleged negligence and want of care, and the New Orleans and Northeastern Railroad Company because it, being the initial carrier, was liable for any loss, damage or injury under the Carmack Amendment, or Section 7 of the Act of Congress of June 29, 1906, amending Section 20 of the Act of Congress of February 4, 1887. (See petition, Tr., p. 3.) A trial on the merits resulted in a judgment for plaintiff (defendant in error in this court) for $2,326.50. (Tr., p. 57.)

On appeal the Supreme Court of Louisiana, on April 22, 1912, reversed the judgment of the lower Court. (See opinion and judgment, Tr., pp. 63 to 75, both inclusive.)

On rehearing (see Tr., pp. 76 to 82, both inclusive), the case was reargued in the Supreme Court of Louisiana, and on April 14, 1913, that Honorable Court rendered a judgment affirming the judgment appealed from. (See Tr., pp. 83 to 97, both inclusive.) From this judgment plaintiff in error, the defendants in the State court, prosecute this writ of error.

The defendant examined twenty-three witnesses under commission. From this evidence the following facts are undisputed:

FIRST. The 700 pockets of rice were delivered to the plaintiff in error on August 21st and 22nd, and were loaded in two cars. These two cars arrived in Augusta and were sent across the Savannah River to Hamburg, on the South Carolina side, where they arrived at 1 o'clock a. m. August 26th. (Testimony of Sykes, Tr., p. 52.)

SECOND. They were then sent across sixteen hundred feet of track and three trestles into the old Hamburg yard (see blueprint, dated 1892, Tr, p. 48), where they were placed in a train for Charleston with a car of unslaked lime. (Tr., p. 16.)

THIRD. On the afternoon of August 26th (one witness says at 2, the other at 5), in consequence of a flood in the Savannah River, **one inch higher than the flood** of 1888, the water came in contact with the lime and started a fire which destroyed the two cars of rice and twenty-seven other cars. (Tr., pp. 16 and 18.) This fire lasted until the morning of August 27th, when employees rowed over in a boat and extinguished it in time to save a car of livestock, though the flood was then higher than when the fire broke out. (Tr., p. 28.)

FOURTH. The cause of this flood was a downpour of rain in that region of South Carolina, which is traversed by the Rocky River and its tributaries, **from Anderson, S. C., which is 100 miles north of Hamburg, down to Calhoun Falls, where that river empties into the Savannah River.** Some of these witnesses speak of this rainfall as a cloudburst, and they say, generally, **that it rained harder than it was ever known before.** J. R. Anderson, superintendent of the Blue Ridge Railway, was at Anderson, and says it began to rain hard about 7 o'clock p. m., August 24th, and continued in a perfect downpour until about noon of the following day, the 25th, and that the rain was the hardest he had ever seen for such a period of time. (Tr., pp. 36, 38, 39, 41, 42, 45, 46.)

FIFTH. The Weather Bureau report issued at Augusta shows the following facts: On August 24th the

river gauge at Augusta registered a height of 11 feet and 10 inches. On the morning of August 25th, it had risen to 22 feet 3 inches, and reports indicated the following heavy rainfalls for the preceding twenty-four hours: Anderson, 5.50 inches; Calhoun Falls, 3.65 inches; Washington, Ga., 1.28 inches; Greenwood, 1.94 inches. A flood warning was issued on the morning of August 25th, forecasting a stage of **thirty-three feet at Augusta in the next twenty-four hours or the morning of August 26th,** and this warning was disseminated widely among the farmers in the lowlands below the City of Augusta. At 10:30, on the morning of August 26th, the gauge registered 34.4 feet at Augusta, and the river was rising at the rate of seven-tenths of a foot per hour. A supplemental warning was then issued, placing the stage at thirty-eight feet by midnight, and the warning stated the entire City of Augusta would probably be submerged. By noon, August 26th, the water was rushing through the streets of Augusta like a millrace. The water continued to rise until about 2 a. m. of the 27th, when the gauge registered 38.8 feet, one inch higher than the flood of 1888. It remained stationary about three hours and then began to recede slowly, registering a height of 38 feet on the morning of August 28th. (Tr., p. 33.)

SIXTH. The yardmaster in Hamburg was notified by the superintendent on the afternoon of August 25th that there would be a rise in the river. (Tr., p. 16.)

SEVENTH. About 8 or 8:30 a. m., August 26th, the yard crew undertook to move these cars from the old Hamburg yard, but failed as the trestles gave way and water came in the ashpan of the engine. (Tr., pp. 16, 24, 28, 29.)

EIGHTH. They did move that morning all the cars they could reach **on to higher ground** before the water became too high (Tr., p. 16.)

NINTH. The records of the Commissioner of Public Works at Augusta, Ga., show the previous high waters at Augusta, as follows (Tr., p. 34):

Year.	Date.	Height.
1888.	September 11th	38.1½*
1891.	March 9th	35.5½
1892.	January 15th	29.5
1894.	October 11th	27.9
1895.	January 11th	30.6
1896.	July 10th	30.3
1897.	April 6th	29.4
1898.	September 3rd	28.5
1892.	February 8th	31.0
1900.	February 14th	32.8
1901.	April 4th	21.3
1902.	March 1st	34.7

*Note that the Weather Bureau report gives this flood as 38 feet 8½ inches.

Under these facts the Supreme Court of Louisiana found that the railroad companies were negligent in the following particulars:

(*a*) In sending the two cars of rice across the Savannah River into the old Hamburg Yard, on the South Carolina side of the river, at 1 o'clock a. m. on August 26, 1908.

(*b*) In placing, under the prevailing conditions, two cars of rice in a train in the low Old Hamburg Yard with a car of unslaked lime.

(*c*) In making no timely effort to remove the two cars of rice from the Hamburg Yard.

(*d*) In making no effort to keep the debris from piling up against the trestle leading from the main line to the Old Hamburg Yard and weakening it.

(*e*) In making no timely effort to put out the fire that destroyed the two cars of rice.

Mr. Chief Justice Breaux, as organ of the Court (Tr., p. 88), said:

> "It also appears that the cars containing plaintiff's rice were taken to the Hamburg yards about 1 o'clock on the morning of the 26th of August, 1908.
>
> "The question arises—Why was it that they put the cars in the low Old Hamburg Yard after they had received warning of the coming flood?"

And again (Tr., p. 90):

> "A close reading of the evidence compels the conclusion that there was not sufficient forethought on the part of the officers in charge of the railroad yards. We have seen that the river was rising rapidly on the morning of the 26th of August. Some of the witnesses testified that by 7 o'clock it had covered the switch tracks, and yet nothing was done to protect property. Leisurely enough, the employees went about their business and gave very little concern to the rising waters. Those who did attempt to save property [if what they did can be considered in that light] displayed very little activity; beginning at 8 o'clock, taking out a few cars and leaving others in the Old Hamburg Yard, that is all they did. These yards were submerged by water to a height above the floors of the cars. The question arises—was it possible before the waters reached their greatest height to move the cars to a safer place than where they were hauled to on

the morning of the 26th of August; that is, to the Old Hamburg Yards? We have noted, before 8 o'clock or 8:30 o'clock a. m., not the least attempt was made to move the cars out of the yard where they had been placed. Mr. Benson, inspector of the Southern Railway Company, testified that on the morning of the 26th of August, he reported at the Hamburg Yard at 7 o'clock to go to work, and at that time the water had just reached the rail in front of the block office. There were a crew and an engine in the yard. Why were they not put at work at the time to save the freight?

"Another witness, the night operator, renders it still more evident that it was possible to move the train in the morning, for he says that when he went to work the yard was entirely free from water on the 26th of August in the morning. An attempt was made to rescue the cars between eight and half-past eight o'clock a. m.; it failed. They went too late to rescue these cars. There had been ample time to save them.

"The oral testimony leads to the inference [as well as the blue print in evidence] that the Old Hamburg Yard is lower than the new yard. According to the blueprint in evidence, the water was quite above the rail of the track, and rose into the cars, while at the yard and telegraph office it was five inches over the rails. This was one of the reasons why they should have been careful not to run the cars into the old yard [the lowest place], after having received notice of the rise of the waters."

Again (Tr., p. 91):

"The rise of the waters in the Savannah River over its banks was not entirely unprecedented, although the rise of thirty-eight feet and eight inches was. Had preparations been made to meet the usual rise, the result would have been different. * * *

"These floods were frequent, and yet defendant remained indifferent, and even sent its cars to the

lowest places on the yard, where they were permitted to remain without making a serious and timely attempt to take them away.

"From all this evidence we are led to the inference, which we think is positive, that there was negligence. A little timely activity would have brought about a different result, and would have saved plaintiff's property, or would have placed defendant in a position to successfully defend themselves.

"Unquestionably, the river was rising rapidly on the morning of the 26th, at 7 o'clock; in thirty-five minutes it covered the switch tracks. It does not seem that anything was done to prevent the destruction of the cars. Leisurely enough, the employees went about their respective occupations, and now, when they give an account of themselves, it does seem as if they wish to lay all the trouble on the rising waters, although they remained indifferent when they should have exerted themselves."

And again (Tr., p. 93):

"On the rehearing only, the contention is that the suit is to be governed by the Carmack Amendment to the Interstate Commerce Act, interpreted in the *Croninger case*, 226 U. S. 148. But if it is to be governed by that decision, defendant would not be in much better position.

* * * * * * * * *

"Admitting, for a moment, all that is claimed under the Carmack amendment, under any of the laws of this country, indifferent railroad people, who receive freight to be transported some distance, and who, just before the waters of a storm have flowed down, stop the cars on the way, and run them to the lowest part of their yards, and place them next to cars loaded with quicklime, easily ignited by water, and leave them at that place, while other cars are taken out, and who make no attempt to haul them

> out, although the waters are rising slowly enough for such work, after warning given, are not protected from the charge of negligence under the law."

This shows that the Supreme Court of Louisiana based its judgment against the plaintiff in error entirely and exclusively on the fact that the destruction of the rice was due to the negligence of the Southern Railway Company.

The finding of the State Court upon the facts is conclusive upon this Court.

> See *Minn. & St. L. R. Co. vs. Minnesota,* 193 U. S. 53; *Waters-Pierce Oil Co. vs. Texas,* 212 U. S. 86; *Chrisman vs. Miller,* 197 U. S. 313; *Chapman, etc., Land Co. vs. Bigelow,* 206 U. S. 41 (51 L. Ed. 953); *Hedrick vs. Atchison, etc., R. Co.,* 167 U. S. 673; *Dower vs. Richards,* 151 U. S. 658; *Egan vs Hart,* 165 U. S. 188; *Thayer vs. Spratt,* 189 U. S. 346.

Under the Carmack act, under the decisions of this and other Federal Courts, and all the State Courts, except possibly Massachusetts and Pennsylvania, it is well settled that, where destruction of merchandise being transported by a common carrier is due to an act of God and the negligence of the carrier, the carrier is liable.

In *The Majestic,* 166 U. S. 375, passengers' baggage in the hold of *The Majestic* was injured by water coming through the porthole. Defendants pleaded act of God—namely, that the porthole had been broken in by a piece of wreckage striking against it in a high sea. The Court said, through Chief Justice Fuller (p. 386):

> "The question still remains, on the doctrine of implied exceptions, whether the injury here was by

the act of God, for which the company was not liable. The burden in this respect is on the carrier. (*Clark vs. Barnwell*, 12 How. 272; *Transportation Company vs. Downer*, 11 Wall. 129; *The Edwin I. Morrison*, 153 U. S. 199; *The Caledonia*, 157 U. S. 124.)

"The act of God, said Chancellor Kent (Vol. 2, p. 597), means 'inevitable accident, without the intervention of man and public enemies'; and again (Vol. 3, p. 216) that 'perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined in the civil law to be, *Quod damno fatali contingit, cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity.' The words 'perils of the sea' may, indeed, have grown to have a broader signification than 'the act of God'; but that is unimportant here.

"Judge Shipman, in the Court of Appeals, quotes from 1 Parsons on Shipping, 255, the definition there given of the 'act of God,' and the reason for it, as follows: 'The "act of God" is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency in causing the loss; for, if this were possible, he should be held.'

"We think it quite clear that the damage complained of cannot be held to have been the result of such inevitable accident. The evidence was wholly unsatisfactory as to any inspection of the porthole before the vessel left Liverpool. What the chief officer says in that regard, in answer to leading questions, is manifestly not of his own personal knowledge, but on the assumption that such inspection had taken place, because it should have, which could have been established, yet was not, by calling

the person whose duty it was to make it. Whether the ports were properly closed when the vessel sailed was not made out, nor was any such inspection of the compartment, after she sailed, proved, as, if the ports were not properly closed, would have detected the fact. The two or three feet of water in the mail room, Orlop No. 3, was perhaps not more than might have been taken in during the first four or five days of the voyage if the ports were not securely fastened and partially open. As remarked by the District Judge, whether the covers to all of the ports in the mail room, where this baggage was placed, were screwed down tight, or whether some of them were left open for light or any other purpose, was not affirmatively shown. The theory of the defense was that the breaking of the port was caused by floating wreckage, and, while that might possibly have been so, there was no evidence directly tending to establish it as a fact. **If it had shown** that when the vessel sailed the ports were in proper condition, and properly closed, and that this was their condition on the day before the accident was discovered, that would have presented a different question. The captain testified that the iron dummy was turned back in a way which could not have been done by the sea, but he admitted that his memory was treacherous after the lapse of time; and the log stated that the port was broken 'either by the sea or by wreckage,' while the chief officer, who was on the bridge, as the captain was not, said that between six and eight that morning he saw only one large piece of wreckage, which was 'a good-sized piece of timber, on the port side, away from the ship.'

"And, as Judge Brown held, if the wreckage referred to was of a kind adequate to force open an iron cover properly constructed and firmly screwed down over the port, **then it devolved upon the com-**

> **pany to show why the ship** did not steer away from the wreckage or slacken speed while passing through it; and this was not attempted. **In our opinion, the company failed to show that the accident was one which could have been prevented by human effort, sagacity and care; and we perceive no reasonable ground for disagreeing with the judgment of the District Court upon the facts."** (Black-letter ours.)

See, also, 24 Howard 121, *The Union S. S. Co. vs. Virginia S. S. Co.*, where this Court said:

> "Plainly, therefore, it is only when disaster happens from natural causes, and without negligence or fault on either side, that the defense set up in this case can be admitted."

See, also, 12 Wallace 254, *Holiday vs. Kennard*, where this Court said:

> "If carrier's negligence contributed to loss by public enemy, it is liable."

See 21 Wallace 230, *The Mohler*, where this Court said:

> "It is insisted that the loss occurred through a peril of navigation, which was one of the exceptions contained in the bill of lading, and that, therefore, the carrier was excused from a delivery of the wheat. The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment."

See, also, 125 Fed. 860, *Harrison vs. Hughes*, paragraph three of the syllabus reading as follows:

> "The extinguishment of the stake light by the wind, due to its improper adjustment, cannot be at-

tributed to the act of God or *vis major*, so as to relieve the contractors from liability, being something which might reasonably have been anticipated, and could have been guarded against in the exercise of reasonable vigilance."

See, also, *Wald vs. Pittsburg, C. C. & St. L. R. Co.*, 162 Ill. 545 (35 L R. A. 356.) Paragraph two of the syllabus reads as follows:

"A common carrier is not exempt from liability for a loss which takes place because of an act of God if the carrier has been guilty of any previous negligence or misconduct which brings the property in contact with the destructive force of the *actus Dei*, or unnecessarily exposes it thereto." And also

Mississippi Logging Co. vs. Robson, 69 Fed. 773 (16 C. A. 400, 32 U. S. 520); *McGraw vs. Baltimore, etc., R. Co.*, 18 W. Va. 365 (41 Am. Rep. 696); see, also, *Engster vs. West*, 35 La. An. 119 (48 Am. Rep. 232); *O'Connor vs. Forster*, 10 Watts (Pa.), 418; *Lehman, Stern & Co. vs. M. L. and T. R. R. Co.*, 125 La. 1.

HUMAN AGENCY EXCLUDED. The expression, "act of God," held to exclude all idea of human agency.

Demeule vs. Quebec, etc., Electric Co., 32 Quebec Super. Ct. 318, quoting this proposition from 1 Am. & Eng. Enc. of Law (2nd Ed.), 587; *Ohlen vs. Atlanta, etc., R. Co.*, 2 Ga. App. 323 (58 S. E. 511); *Kirby vs. Wylie* (Md.), 70 Atl. 213, quoting this proposition from 1 Am. & Eng. Enc. of Law (2nd Ed.), 584, 585; *Dibble vs. Morgan*, 1 Woods,

406 (7 Fed. Cas. Bo. 3881); *Chicago, etc., R. Co. vs. Sawyer*, 69 Ill. 285 (18 Am. Rep. 626); *Merchants' Dispatch Co. vs. Smith*, 76 Ill. 542; *Indiana, etc., R. Co. vs. Hawkins*, 81 Ill. App. 570; *McClary vs. Sioux City, etc., R. Co.*, 3 Neb. 44 (19 Am. Rep. 631): *Parsons vs. Monteath*, 13 Barb. (N. Y.) 353; *Smith vs. North American Transp., etc., Co.*, 20 Wash. 580 (56 Pac. 372).

"When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to acts of God."

Polack vs. Pioche, 35 Cal. 416 (96 Am. Dec. 115); *Norris vs. Savannah, etc., R. Co.*, 23 Fla. 182 (1 So. 475, 11 Am. St. Rep. 355); *Central Line of Boats vs. Lowe*, 50 Ga. 509; *Louisville, etc., R. Co. vs. Hedger*, 9 Bush (Ky.), 645; *Kiff vs. Old Colony, etc., R. Co.*, 117 Mass. (19 Mass. Rep. 429); *Michaels vs. New York Central R. Co.*, 30 N. Y. 564 (86 Am. Dec. 415); *Read vs. Spraulding*, 30 N. Y. 630 (86 Am. Dec. 426); *Friend vs. Woods*, 6 Gratt. (Va.) 189 (52 Am. Dec. 119); *Klauber vs. American Express Co.*, 21 Wis. 21 (91 Am. Dec. 452).

In 2 Parsons on Contracts (7th Ed.), 159, it is said:

"We take the true definition of the 'act of God' to be a cause which operates without the aid or in-

terference from man. For, if the cause of loss was wholly human, or became destructive by human agency and co-operation, then the loss is to be ascribed to man, and not to God, and to the carrier's negligence, because it would be dangerous to the community to permit him to make a defense which might so frequently be false and fraudulent."

HEAVY RAINS NOT ACT OF GOD.—In *Cannon vs. Hunt*, 113 Ga. 501 (38 S. E. 983), it was said:

> "Constant, unusual or heavy rains cannot of themselves be classed as a providential hindrance."

See, also, *Greeson vs. Virginia Midland R. Co.*, 140 U. S. 435 (11 S. Ct. 859, 35 U. S. [L. Ed.] 458); *Sawyer vs. Ives*, 4 Quebec Q. B. 389.

On page 1111 of Volume 1 of the New American and English Encyclopedia of Law and Practice, the rule is as follows:

> "*b*) NEGLIGENCE OF CARRIER AS CO-OPERATIVE CAUSE.—CARRIERS NOT EXEMPTED. **Where the negligence of the carrier concurs with an act of God in producing a loss, the carrier is not exempted from liability by showing that the immediate cause of the damage was the act of God.** (*Siegel vs. Eisen*, 41 Cal. 109; *Williams vs. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Converse vs. Brainerd*, 27 Conn. 627, and many others.) Or, as it has been expressed: 'Where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible.' (*Steele vs. McTye*, 31 Ala. 667, 70 Am. Dec. 516; *Peck vs. Weeks*, 34 Conn. 145, and many others.)

Thus, an act of God, such as a flood, is no excuse to the carrier if he could have foreseen the happening of the event, and, by the exercise of due diligence, protected the goods against loss and injury. (*Smith vs. Western R. Co.*, 91 Ala. 455, 8 So. 754, 11 L. R. A. 619, 24 Am. St. Rep. 929); *Savannah, etc., R. Co. vs. Commercial Guano Co.*, 103 Ga. 590, 30 S. E. 555; *Clark vs Pacific R. Co.*, 39 Mo. 184, 90 Am. Dec. 458; *Pinkerton vs. Missouri Pac. R. Co.*, 93 S. W. 8491; *Moffat Commission Co. vs. Union Pacific R. R. Co.*, 113 Mo. App. 544, 88 S. W. 117, and many others.)"

Page 1113 (*b*):

"It is not sufficient to relieve a carrier of liability for injury to goods that the damage should have resulted from unusual and unforeseen action of nature. The carrier must show, further, that the injury could not have been prevented by any foresight, pains or care reasonably to be expected. (*Harzburg vs. Southern R. Co.*, 65 S. C. 539, 543, 545.)"

Ga. & S. F. R. Co. vs. Barfield, 58 S. E. 236:

"An injury cannot be said to be the act of God which, under any fair view, can be attributed to the negligence of man."

So. Ry. Co. in Kentucky vs. Smith, 102 S. W. 232 (31 Ky. Law. Rep. 243):

"To exempt a carrier from liability for loss of goods by reason of act of God, it must be free from negligence."

Fentiman vs. A. T. & S. F. Ry. Co., 98 S. W. 939 (Tex.); see, also, *Davis vs. Wabash, St. L. & P. Ry. Co.*, 13 Mo. App. 449.

Elliott on Railroads, Vol. 4, par. 1457, says:

> "But it is clear that where the negligence of the carrier mingles as a proximate cause with the act of God, and the resulting loss is a probable consequence of such negligence, as where the carrier was aware of an extraordinary flood or the like in time to have saved the goods by the exercise of ordinary care and diligence, the carrier is liable for the resulting loss."

The law is well put in the case of *Grier vs. Railroad*, 108 Mo. App. Reps. 580, where the Court said:

> "If the negligence on the part of the appellant co-operated with the violence of nature in bringing about the loss of respondent's property, the appellant must answer in damages. (*Haney vs. Kansas City*, 94 Mo. 334, 7 S. W. 417; *Brash vs. St. Louis*, 161 Mo. 433, 61 S. W. 808.) It is only when an act of God, unmixed with proximate negligence on the part of the carrier, injures and destroys in the latter's custody, that it is excused from answering to the owner. The cases cited and relied on by the appellant dealt with a state of facts in which, though the carrier was negligent in handling the property consigned to it, its negligence, which consisted in unreasonable delay in transporting the property to destination, did not enter as a proximate cause into the loss of the property, which loss was due, legally speaking, solely to the act of God. (*Denny vs. Railroad*, 13 Gray, 48; *Headley vs. Transportation Co.*, 113 Mass. 304; *Morrison vs. Davis*, 20 Penn. St. 171; *Long vs. Railroad*, 147 Penn. St. 343; *Henning vs. Railroad*, 32 Am. & Eng. Railroad Cases (Va.), 262; *Slater vs. Railroad*, 29 Ga. 96; *Northwest Trans. Co. vs. Ins. Co.*, 41 Fed. 793; *Railway vs. Reeves*, 10 Wall. (U. S.) 176; *St. Louis, etc., Co. vs. Ins. Co.*, 139 U. S. 223.) In all those decisions it appeared

> the carrier had been guilty of some delay in moving the property, but for which it would not have been where the catastrophe occurred, and, therefore, would have escaped injury. But, **as the catastrophe happened unexpectedly,** and was not **within the range of reasonable foresight, the negligent delay was not indulged** while the carrier realized there was peril to the property, and, therefore, did not participate, as a concurrent cause, in bringing about the loss. The doctrine of the cases cited on this point by the appellant is one that pervades the law of negligence, and by virtue of it a common carrier's neglect, like any other party's, must enter as a proximate cause into the happening of an injurious accident to entail liability. But it **need not be** the sole cause. **If it is a contributive one, liability attaches to the carrier."**

Both the original and final opinions of the Louisiana Supreme Court quote from the opinion of Justice Hydrick, of the Supreme Court of South Carolina, in the case of *Ferguson vs. Southern Railway Company*, 91 S. C. 61 (74 S. E. Rep. 129, as containing a clear and accurate expression of the principles which should govern. This was a suit against the same railroad company for damages to freight caused by the flood in the Wateree River, in South Carolina, August 26, 1908, and in many facts and attendant circumstances is very similar to the present case, though not so strong, as the car in that case was not placed in a train with unslaked lime, and that flood was three and a half feet higher than all former floods, while in this case it was only one inch higher. The decision, handed down in April, 1911, in which the carrier was held liable, reads in part as follows:

> "The rule upon which this case must be decided was stated thus in *Slater vs. Railway:* 'Where an act

of God causes injury to property in the hands of a common carrier, and such act is the sole cause of such injury, then the proof of this fact is a perfect shield. But if there be any negligence on the part of the carrier which, if it had not been present, the injury would not have happened, notwithstanding the act of God, the carrier cannot escape responsibility. And the onus is upon the carrier to show not only that the act of God was the cause, but that it was the entire cause; because it is only when the act of God is the **entire** cause that the carrier can be shielded.'

"Before proceeding to a consideration of the testimony, we state some of the principles which should guide the Court in deciding whether there is any evidence of negligence on the part of a defendant in a case like this, and which should likewise guide the jury in passing upon its sufficiency, and in determining whether it preponderates.

"In 1 Thomp. on Neg., Sec. 28, the author says: 'In determining whether the due degree of care has been exercised in any situation, reference must be made to the facts and surroundings of that situation, and the question cannot be determined by abstract theorizing or idealizing. The question must be looked at as the defendant might have looked at it, situated as he was, and surrounded as he was. The jury ought to determine it by their foresight, and not by their hindsight. Speaking with reference to this question, it has been quaintly reasoned that the fact that, after an injury occurs by accident, some man of genius discovers a superior method of preventing such accidents, does not show negligence in failing to use such method of prevention. Accordingly, that which never happened before, and which in its character is such that it would not naturally occur to prudent men to guard against its happening, cannot, when, in the course of years, it does

happen, furnish good grounds for a charge of negligence in not foreseeing its possible happening, and guarding against that remote contingency.' In *Cornmann vs. Eastern Counties R. Co.*, 4 H. & N. 786, Bramwell, B., said: 'In such a case, it is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event.' In 21 A. & E. Enc. of Law (2nd Ed.) it is said: 'The mere fact that an injury might have been avoided by the adoption of certain precautions does not prove that there was fault in failing to anticipate and provide against it. Nor is the fact that after the occurrence of an accident it is seen that such accident might have been easily guarded against conclusive of negligence. Thus, where the possibility of a particular occurrence is demonstrated only by its happening, there is no liability in negligence. But the fact that no such accident as the one complained of had ever happened before is not, of course, conclusive of the fact that there was no negligence.'

"In Volume 13 of the same work, page 721, it is said: 'An extraordinary flood is to be classed among the acts of God which no human power can prevent or avert. Whether it will relieve the carrier from liability depends upon whether its results or natural consequences could, by the exercise of reasonable foresight and prudence, have been foreseen and guarded against. If the emergency was one that no human sagacity, guided by any of the known principles of human reasoning, could have anticipated, the carrier will be relieved. **If, on the other hand, its effects might have been foreseen by the exercise of reasonable diligence and prudence, a failure to do so would be negligence and subject the carrier to damages, although the original cause was the act of God.'** And, on page 722 of the same volume, this rule is stated: 'If a carrier discovers that goods in-

trusted to his care are in peril of injury or destruction by a flood, then it becomes his duty to use actively and energetically all the means at his command, or which it might be reasonably expected that one engaged in such business would possess, to meet the emergency, and save the property from injury, and any neglect to use the means stated above, which prudent, skillful men in that business might ordinarily be expected to use in such an emergency will subject the carrier to liability.'

"It requires no citation of authority to sustain the proposition that, after a carrier has discovered, or, by the exercise of reasonable prudence and diligence should have discovered, that goods in his possession are subject to the peril sof an unprecedented flood, or other *vis major*, it is his duty to exercise reasonable care and diligence to save them from damage or loss." (Black-letter ours.)

Should Your Honors conclude to review the evidence in the record with a view of determining, independently of the opinion of the Supreme Court of Louisiana, whether or not the defendants were negligent, we believe that the undisputed facts clearly show that the railroad companies were negligent.

The opinion of the Supreme Court of Louisiana on rehearing discusses the evidence on the questions of negligence so fully, and the conclusion reached by it, that the railroad companies were negligent, is so logical and so strongly fortified by quotations from the evidence, that we shall make but few additional comments.

The railroad companies had knowledge that the Savannah River was rising rapidly and would at least go to 33 feet by the morning of August 26th, and higher if the rain continued above. Notwithstanding this, it deliberately at

1 o'clock on the morning of the 26th, sent the two cars of rice across 1,600 feet of track and three trestles into the old Hamburg yard, and there placed them in a train with lime that is easily ignited by coming in contact with water.

Admitting that an unsuccessful effort was made to get the two cars of rice out of the Hamburg yards on the morning of August 26th, about 8 o'clock, the question presents itself why were the two cars sent into the Hamburg yard at 1 o'clock on that morning if it was necessary to remove them at 8 a. m. Surely the railroad companies did not know anything more at 8 o'clock than they did at 1 o'clock, when they sent the cars across the Savannah River into the old yard. The knowledge that prompted the railroad companies to endeavor to remove the cars at 8 a. m., August 26th, was present, and should have warned them not to send the two cars of rice into the Hamburg yard at 1 o'clock, August 26th. The river was no higher at 8 a. m. on August 26th than the bureau had predicted it would be twenty-four hours earlier. If the height of the river at 8 a. m. on the morning of August 26th was sufficient to require the carrier to attempt to remove the cars from the old Hamburg yard, then the warning of the weather bureau on the morning of August 25th, that the river would be at the height that it really was on the morning of August 26th, should have prevented the carrier from sending the cars into the old Hamburg yard at 1 o'clock on the morning of the 26th, and there placing them in a train with a carload of unslaked lime.

At 10:30 a. m., August 26th, the gauge showed 34.4 feet of water, and the river was then rising at the rate of 7/10 of a foot per hour; therefore, at 8 o'clock a. m., August 26th, the water had not reached the gauge predicted for that hour. If due care suggested at 8 a. m. the attempt to

remove, should not the same due care have suggested placing them on higher ground at 1 a. m.?

In *Memphis R. Co. vs. Reeves*, 10 Wall. 176, the case so often quoted and so strongly relied on by plaintiff in error, the statement of facts reads in part as follows:

> "Freshets of the years 1826 and 1847, the highest ever remembered previous to one now to be spoken of, or of which there was any tradition, had not risen by **within three feet as high as the level of the railroad track** in the station where the cars containing the tobacco were placed, on their coming back to Chattanooga, after their unsuccessful attempt to go forward. * * *
>
> "The rise was at first gradual, and from the direction of Lookout Mountain, by backing; but afterwards it came **suddenly from the direction of the Western and Atlantic road, opposite to its former direction, and then rose very rapidly.**"

Justice Miller, the writer of the opinion of the *Reeves case*, quotes approvingly from the decision in the case of *Morrison vs. Davis & Co.*, 20 Pa. State 171, as follows:

> "The Court further held that when carriers discover themselves in peril of inevitable accident, the law requires of them ordinary skill care and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them."

In the present case the heavy downpour of rain fell from 75 to 100 miles above Augusta and Anderson, S. C., on the night of August 24th and the morning of August 25th, but these cars were not destroyed until the afternoon of August 26th. Notwithstanding plaintiff in error had

knowledge of the downpour of rain, which was harder than ever known before, and that there was going to be an overflow of the Savannah River at Augusta, it deliberately run the cars of rice into Augusta, and at 1 a. m. on the 26th of August sent them to the low old Hamburg yard, and there placed them in a train with quicklime.

In all the Federal cases, as in the *Reeves case* quoted by plaintiff in error, the catastrophe happened suddenly, and this suddenness was an essential element of the successful defense. The weather bureau report of August 25th, when the gauge showed 22.3 feet, indicated a rainfall of 5½ inches at Anderson, and 3.65 inches at Calhoun Falls (see Tr., p. 33), for the preceding 24 hours. These points are from 75 to 100 miles above Augusta, on the Savannah River, and the water was obliged to find an outlet through that river, and common sense and common prudence should have made this carrier know that the predicted 33 feet would not be the maximum.

The fact that these rains happened 100 miles above Augusta, while the rains causing the flood of 1888, which was only one inch lower, fell right there, weakens rather than strengthens defendant's argument, for railroads, like ordinary men, are supposed to know that water will seek the sea level.

We beg to call the Court's attention to the fact that the immediate cause of the loss was fire; the fire was the result of the combination of two concomitant factors—namely, water and lime. Had there been no fire, the rice would have suffered but little damage. Why should the water be considered the "*causa causans*" any more than the placing of the cars in a train with a car of lime? They were placed there on the morning of August 26th at 1 o'clock,

notwithstanding the certainty of a flood and the fact that, on August 26th, the old Hamburg yard would most probably be submerged to a greater depth than ever before, as the rainfall just above had been unprecedently heavy on August 25th. On this point see 166 U. S. 52, *Washington & Georgetown R. Co. vs. Hickey*. Here the gateman of a steam railroad raised the gates and the driver of a street car drove upon the track in front of a moving train. The gates were then lowered, and one of the street car passengers was injured in the commotion. This Court held that both the street car company and the steam railroad were liable, using the following language on page 527:

> "The negligent act of the horse car driver joined with and became a part of the other act in wrongfully lowering the gates, as described, and both acts constituted but one cause for the commotion which naturally resulted therefrom, and on account of both of these acts, as parts of a whole transaction, the injury occurred."

We respectfully ask that the writ of error be dismissed, and, in the alternative, that the judgment of the lower Court be affirmed.

Respectfully submitted,

GUSTAVE LEMLE,
W. CATESBY JONES,
ARTHUR A. MORENO.

APPENDIX

We have just received the brief of plaintiff in error, and quote therefrom the following paragraph, which is found in his discussion of the limitation of the bill of lading—viz.:

> "Notwithstanding all this, the Supreme Court of the State of Louisiana has ridden roughshod over the contract between the parties, and, without any prayer to that effect by the original plaintiff, defendant in error, has wiped out the stipulations of that contract, and has held that the burden of proof was and is upon the carriers. This holding is in the teeth of the Federal jurisprudence upon the subject."

We challenge this statement sharply and beg to call the attention of this Honorable Court again to the quotations cited above from the opinion of the Louisiana Supreme Court which show conclusively that this Court found that the carriers were negligent and were liable under any system of law, whether State or Federal. Plaintiffs in error contend that we have failed to sustain burden of proof, because we did not put any witnesses on the stand to testify with regard to negligence of carrier. As we understand the law, it is not necessary in order to sustain burden of proof to introduce witnesses. Here the admissions of defendants' witnesses, both on direct and cross-examination, show conclusively that the defendant has been negligent. This is all that is required. The burden of proof has been sustained.

In conclusion, we beg to call this Honorable Court's attention to the case of *United States vs. King*, 7 How. 865, where Mr. Justice Wayne, on rehearing, held that the facts

found by the Louisiana Supreme Court were final in the following language:

> "No point has been more repeatedly and authoritatively settled than that this Court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the Court below, and as they are exhibited by the record."

United States Supreme Court.

OCTOBER TERM, 1913.

Office Supreme Court
FEB 25 19
JAMES D. MA

No. 615.

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY AND THE SOUTHERN RAILROAD,
Plaintiffs in Error,

versus

NATIONAL RICE MILLING COMPANY,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR AND ON THE MERITS.

GUSTAVE LEMLE,
W. CATESBY JONES,
ARTHUR A. MORENO,
Counsel for Defendant in Error.

HAUSER PRINTING CO., "The Legal Printers," 620-22 Poydras St., N. O., La.

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Having been informed by the Clerk of this Honorable Court that your Honors will consider this case both on the motion to dismiss or affirm and on the merits, we wish to

add to our brief on that point a short reply to the argument of plaintiffs in error, as we did not have their brief when ours was prepared.

Plaintiffs in error, on page 7 of their brief, in opposition to the motion to dismiss or affirm, say:

> "The Louisiana Court actually applied to this case the Federal rule, and actually reversed the decision of the lower Court in favor of the plaintiff (defendant in error). Thereafter, on rehearing, it applied the Louisiana rule and held the defendants (plaintiffs in error) liable."

We take issue with the able attorneys of plaintiff in error on this statement. In its original opinion, April 22, 1912, the Supreme Court of Louisiana (Tr., p. 64) said:

> "Defendant examined twenty-three witnesses under commissions."

The Court then reviews the evidence, making many quotations therefrom, and on page 75 of the record said:

> "It being established beyond controversy that the proximate cause of the loss complained of was an unprecedented flood, which, standing alone, is a sufficient defense to this action, we are of the opinion that the burden of proof rested upon plaintiff to show that, the flood notwithstanding, the loss could have been averted by the exercise by the defendants of reasonable care and skill. (*Memphis vs. Reeves*, 77 U. S. 176; *Elam vs. R. R.*, 93 S. W. 851; *R. R. Co. vs. Bergman*, 64 S. W. 999.) Plaintiff has, however, not attempted to carry that burden, save by the cross-examination of defendant's witnesses; and, for the reasons assigned, we do not think the attempt, as thus made, successful."

As plaintiffs were in New Orleans, La., at the time of the destruction of the rice in South Carolina, in the possession of the railroad companies, the plaintiffs necessarily were obliged to rely on the cross-examination of defendants' twenty-three witnesses.

This necessity has been recognized by this Court in *G., H. & S. F. Ry. Co. vs. Wallace,* 223 U. S. 481, where Justice Lamar said:

> "The plaintiffs were not obliged both to prove their case and to disprove the existence of a defense. The carrier, and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been done. This must be so, because carriers not only have better means, but often the only means, of making such proof."

Apparently the author of the first opinion, while finding some evidence of negligence, did not think that negligence sufficient to meet the requirement of the rule in the *Memphis R. Co. vs. Reeves case,* and, therefore, reversed the judgment.

We must admit the first contention of plaintiff in error, **but we deny emphatically his second contention, that the application of the Louisiana rule on rehearing caused the reversal of the original judgment rendered by the Supreme Court of Louisiana.** We contend that judgment was reversed because the Court found the carriers negligent in **at least five particulars** from the evidence in the record, under both the Federal and State rules, and that the opinion is unmistakably clear and emphatic on this point.

In supporting his second contention, plaintiff in error makes much of the fact that defendant in error sharply at-

tacked this application of the Federal rule in the beginning of the petition for rehearing. The petition for rehearing did open with the paragraph referred to on page 3 of the brief of plaintiffs in error, and this was one of the reasons for requesting a rehearing; but a reading of that petition will show that a rehearing was also asked for other reasons, and especially for the reason that the Court had erred in its finding of fact, **as the evidence in the record showed that plaintiffs in error were negligent, and that their negligence, combined with the flood, caused the destruction of the rice.**

A rehearing was granted without reasons (Tr., p. 82), and on the 5th day of March, 1913, the case was reargued orally and submitted (Tr., p. 83) to the Court.

On April 14th the Court rendered its opinion and judgment on rehearing. (Tr., p. 84.) The Court in its opinion (Tr., p. 85) said:

> "Many of the issues are of fact."

The Court then reviews the testimony in the record, making numerous quotations from the testimony (see Tr., pp. 85, 86, 88, 89, 91), and said:

> **"From all this evidenec, we are led to the infreence, which we think is positive, that there was negligence. A little timely activity would have brought about a different result, and would have saved plaintiff's property, or would have placed defendant in a position to successfully defend themselves.**
>
> "From the first there is evidence that the trestles were unsafe, prematurely weak, so much so that in the early rise they were washed away. Trees and lumber were allowed to bank up as they drifted down against these trestles; nothing was done to relieve

> the situation at this point, although trees were pressed down the current, passing under and undermining the trestles. A former employee came to the place and saw the danger; he moved away the banked-up debris as well as he could, though he was not in the employ of the defendant. When asked why he had worked as he had, his reply was that he wished to help the companies. He, the former employee, worked to save property, but the railroad people did nothing to move away this obstruction. The employees were not as mindful of the necessity of taking care of freight as they should have been. They thought it may be that the waters would not rise sufficiently high to get into the freight cars. In this they assumed too much. The reports received in regard to the flood did not justify that assumption. The cars were ready to be hauled away; no one testified why they were not hauled to destination."

It will be noted, therefore, that the Court said:

> "From all the evidence we are led to the inference, which we think is positive, that there was negligence."

It follows, therefore, that the Court on rehearing found from the evidence in the record that the defendant railroad companies were negligent, and the Court, therefore, did not base its decision upon any rule as to the onus of proof.

On page 93 of the record the Supreme Court of Louisiana further said:

> "On the rehearing only, the contention is that the suit is to be governed by the Carmack amendment to the Interstate Commerce Act, interpreted in the *Croninger case*, 226 U. S. 148. But, if it is to be governed by that decision, defendant would not be in a much better position. * * *

> "Admitting, for a moment, all that is claimed under the Carmack amendment, under any laws of this country, indifferent railroad people, who receive freight to be transported some distance, and who, just before the waters of a storm have flowed down, stop the cars on the way, and run them to the lowest part of their yards, and place them next to cars loaded with quicklime, easily ignited by water, and leave them at that place, while other cars are taken out, and make no attempt to haul them out, although the waters are rising slowly enough for such work after warning given, are not protected from the charge of negligence under the law. The decision in *Railroad Co. vs. Reeves*, 10 Wallace, 197, cited by defendants, is not determinative of the issues, considered from any point of view. In the last cited case, reviewing another decision, this Court, through Justice Miller, said, in substance, that the law requires some skill and forethought of carriers. If judged from that point of view exclusively, the carrier is not excused, unless he shows some activity in protecting property in case of necessity."

It will be noted that the Court held that the defendants were negligent under the evidence in the record. If everything said in the decision relative to the burden of proof was eliminated therefrom, the opinion and judgment would not be in the least affected. It will be borne in mind that the Court said: "From all this evidence [the evidence quoted in the record], we are led to the inference, which we think is positive, that there was negligence." The learned counsel for plaintiffs in error were, therefore, mistaken when they said that the Court in its original opinion applied the Federal rule as to the burden of proof and reversed the decision of the lower Court, and that thereafter,

on rehearing, it applied the Louisiana rule and held the defendants liable. We repeat that the decision of the Supreme Court of Louisiana holds the defendant carriers liable on the sole ground that the evidence in the record, which is referred to by the Court, shows positively that the defendants were negligent.

The decision of the Supreme Court of the State was, therefore, based on **a principle of general law broad enough to sustain the decision,** and this Court will not take jurisdiction.

Arkansas So. R. R. Co. vs. German Bank, 207 U. S. 270; *Eustis vs. Bolles,* 150 U. S. 361.

But suppose we concede, for the purpose of argument, that the Supreme Court of Louisiana reached a conclusion by following a State rule as to the burden of proof, and that the State rule differs from the Federal rule. We submit that, under the well-settled jurisprudence of this Court, findings of the Supreme Court of Louisiana upon questions of fact are not open to review.

Waters-Pierce Oil Company vs. Texas, 212 U. S. 86; *Chrisman vs. Miller,* 197 U. S. 313.

In *Minn. & S. L. Ry. Co. vs. Minnesota,* 193 U. S. 53, where the District Court in Minnesota had found as a fact that a station-house was needed at Emmons, and the Supreme Court of the State divided equally on the question (two Judges affirming and two reversing), this Court said, through Mr. Justice McKenna, on page 64 of the opinion:

> "The charge is that the property of plaintiff in error is taken without due process of law, but whether so taken is made to depend upon a question of fact, the requirement of 'an unnecessary and wholly useless expenditure of money.' It is well es-

> tablished that on error to a State court this Court cannot re-examine the evidence, and when the facts are found we are concluded by such finding. (*Egan vs. Hart*, 165 U. S. 188.) But in the case at bar we are met by the circumstance that the Supreme Court equally divided on the question whether the facts distinguish this case from 76 Minnesota, 469. The plaintiff in error, therefore, contends that there has been no judgment of the Supreme Court on the facts and they are open to review here. The contention is not tenable. There is no statement of facts by the Supreme Court, and its decision, though by a divided court, constituted an affirmance of the finding of the District Court."

The plaintiffs in error cite several cases in which this Court has, upon a writ of error to a State court, reviewed its findings upon questions of fact; but in all the cases rests **entirely and exlcusively on the fact, as stated by that Court in its opinion** (Tr., p. 91), **"From all this evidence,** whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. As the decision of the Supreme Court of Louisiana rests entirely and exclusively on the fact, as stated by that Court in its opinion (Tr., p. 91), **"From all this evidence, we are led to the inference, which we think is positive, that there was negligence"** (black-letter ours), this Honorable Court will not review this finding of fact, as the question of negligence *vel non* involves no right under a Federal statute.

The question of negligence *vel non* being one of fact, and the Supreme Court of Louisiana having rested its de-

cision on that point entirely, its judgment is conclusive or this Honorable Court.

Railroad Company vs. Brewer, 231 U. S. 245-249; *Waters-Pierce Oil Company vs. Texas*, 212 U. S. 112-116; *Minneapolis & St. L. R. Co. vs. Minnesota*, 193 U. S. 53.

The only complaint that plaintiff in error has to make is that the Supreme Court of Louisiana made a mistake in holding that the railroad companies were negligent. To hold that the Supreme Court of the United States has jurisdiction to review the conclusions reached by the Supreme Court of the State on the question of negligence would be to make the Supreme Court of the United States a court of review for the errors of the Supreme Court of Louisiana; that is, would make it the judge of the correctness of the decisions of the Supreme Court of Louisiana in every case in which the litigants chose to carry the decisions of the Supreme Court of Louisiana to this Court on an averment that the Supreme Court of Louisiana had erroneously decided the same.

In *Central Land Company vs. Laidley*, 159 U. S. 103, Mr. Justice Gray said:

> "When parties have been fully heard in a regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States."

Walker vs. Sauvinet, 92 U. S. 90; *Heard vs. Amoskeag*, 113 U. S. 9, 26; *Morly vs. R. R.*, 146 U. S. 162, 171; *Bergman vs. Backer*, 157 U. S. 655; *New Orleans Waterworks*

Company vs. La. Sugar Refining Co., 125 U. S. 38; *Bacon vs. Texas*, 163 U. S. 207.

In *Bank vs. Buckingham*, 5 How. 317, 343, and *Lawler vs. Walker*, 14 How. 149, 154, this Court said:

> "It is the peculiar province and privilege of the State Courts to construe their own statutes; and it is no part of the function of this Court to review their decisions, or assume jurisdiction over them, on the pretense that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of errors committed by their judiciary."

In *Knox vs. Exchange Bank*, 12 Wall. 379, 383, it was held:

> "We are not authorized by the judiciary act to review the judgments of the State Courts because their judgments refuse to give effect to valid contracts, or because their judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court would be brought here, where the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held."

The same doctrine was stated by Mr. Justice Harlan, speaking for this Court, as follows, in *Leigh Water Co. vs. Easton*, 121 U. S. 388, 392:

> "The State Court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which in our opinion is valid; it may adjudge a contract to be valid which in our opinion is

> void; or its interpretation of the contract may, in our opinion, be radically wrong; but in neither such cases would the judgment be reviewable by this Court."

The Supreme Court of Louisiana having held the railroad companies liable on account of their negligence, it follows that there is no Federal question involved, and this Court will dismiss the writ of error.

It is further contended by the learned attorney for plaintiffs in error that, this being an interstate shipment, the right and liability of the railroad companies must be determined by the provisions of the Carmack Act; that the Supreme Court of Louisiana held under the State statutes that the burden of proof was upon the railroad companies to show that the destruction of the two cars of rice was not only caused by an act of God, but that it was the entire cause—*i. e.*, there was no act of negligence on the part of the carrier which brought about the injury, and that this ruling of the Supreme Court was contrary to the Federal jurisprudence, which holds that the carrier need only show that the property was destroyed by the act of God. The Federal jurisprudence, as we understand it, is that before a common carrier can escape liability on the ground of the act of God, it must show that this was the entire cause. See *The Majestic*, 166 U. S. 376, where this Court said:

> "The act of God, said Chancellor Kent (Vol. 2, p. 597), means 'inevitable accident, without the intervention of man and public enemies'; and again (Vol. 3, p. 216), that 'perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined in the civil law to be, *quod damno fatali con-*

tingit, cuivis diligentissimo possit contingere. It is a loss happening in spite of all human effort and sagacity.' The words 'perils of the sea' may, indeed, have grown to have a broader signification than 'the act of God,' but that is unimportant here.

"Judge Shipman in the Court of Appeals quotes from Parsons on Shipping, 255, the definition there given of the 'act of God,' and the reason for it, as follows: 'The "act of God" is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency in causing the loss; for, if this were possible, he should be held.'

* * * * * * * * *

"In our opinion the steamship company failed to show that the accident was one which could not have been prevented by human effort, sagacity and care, and we perceive no reasonable ground for disagreeing with the judgment of the District Court upon the facts."

See, also, *The Cape Charles,* 189 Fed. 346.

But suppose it were otherwise, and suppose the Supreme Court of Louisiana erred as to where the burden of proof rested—whether upon the railroad company to show that the destruction was due entirely to the act of God or upon the plaintiff to show the negligence of the carrier—how can it affect the situation? The fact remains that, from the evidence in the record, the Supreme Court of Louisiana concluded that the railroad companies were negligent in many respects. This is evidenced from the following language taken from the opinion of the Supreme Court of Louisiana:

"Admitting for a moment all that is claimed under the Carmack Amendment—Under any of the

> laws of this country, indifferent railroad people, who receive freight to be transported some distance and who just before the waters of a storm have flowed down stop the cars on the way and run them to the lowest part of their yards and place them next to cars loaded with quicklime, easily ignited by water, and leave them at that place while other cars are taken out, and who make no attempt to haul them out, although the waters are rising slowly enough for such work after warning given, are not protected from the charge of negligence under the law."

It is evident that the Supreme Court of Louisiana, instead of refusing to follow the Carmack Amendment, did follow it, and concluded from the evidence in the record that the defendants' negligence in conjunction with the act of God caused the destruction of the two cars of rice. If everything that was said in the opinion relative to the burden of proof was eliminated from the opinion, it would not in the least affect the judgment, which is based entirely upon the negligence of the defendants found from the evidence in the record.

ON THE MERITS.

Statement of Facts.

On August 21 and 22, 1908, the National Rice Milling Company, the defendant in error, delivered at New Orleans, La., to the New Orleans and Northeastern Railroad Company, plaintiff in error, to be transported to Charleston, S. C., respectively, three hundred and four hundred pockets of clean rice. (See bills of lading, Tr., p. 4.) The rice was destroyed by fire at Hamburg, S. C., while en route, in the

possession of the Southern Railway Company. The present action was brought against the Southern Railway Company and the New Orleans and Northeastern Railroad Company, *in solido*, to recover $2,487.50, its value. The Southern Railway Company was made a party because the destruction of the rice was due solely to its alleged negligence and want of care, and the New Orleans and Northeastern Railroad Company because it, being the initial carrier, was liable for any loss, damage or injury under the Carmack Amendment, or Section 7 of the Act of Congress of June 29, 1906, amending Section 20 of the Act of Congress of February 4, 1887. (See petition, Tr., p. 3.) A trial on the merits resulted in a judgment for plaintiff (defendant in error in this court) for $2,326.50. (Tr., p. 57.)

On appeal the Supreme Court of Louisiana, on April 22, 1912, reversed the judgment of the lower Court. (See opinion and judgment, Tr., pp. 63 to 75, both inclusive.)

On rehearing (see Tr., pp. 76 to 82, both inclusive), the case was reargued in the Supreme Court of Louisiana, and on April 14, 1913, that Honorable Court rendered a judgment affirming the judgment appealed from. (See Tr., pp. 83 to 97, both inclusive.) From this judgment plaintiff in error, the defendants in the State court, prosecute this writ of error.

The defendant examined twenty-three witnesses under commission. From this evidence the following facts are undisputed:

FIRST. The 700 pockets of rice were delivered to the plaintiff in error on August 21st and 22nd, and were loaded in two cars. These two cars arrived in Augusta and were sent across the Savannah River to Hamburg, on the South Carolina side, where they arrived at 1 o'clock a. m. August 26th. (Testimony of Sykes, Tr., p. 52.)

SECOND. They were then sent across sixteen hundred feet of track and three trestles into the old Hamburg yard (see blueprint, dated 1892, Tr, p. 48), where they were placed in a train for Charleston with a car of unslaked lime. (Tr., p. 16.)

THIRD. On the afternoon of August 26th (one witness says at 2, the other at 5), in consequence of a flood in the Savannah River, **one inch higher than the flood** of 1888, the water came in contact with the lime and started a fire which destroyed the two cars of rice and twenty-seven other cars. (Tr., pp. 16 and 18.) This fire lasted until the morning of August 27th, when employees rowed over in a boat and extinguished it in time to save a car of livestock, though the flood was then higher than when the fire broke out. (Tr., p. 28.)

FOURTH. The cause of this flood was a downpour of rain in that region of South Carolina, which is traversed by the Rocky River and its tributaries, **from Anderson, S. C., which is 100 miles north of Hamburg, down to Calhoun Falls, where that river empties into the Savannah River.** Some of these witnesses speak of this rainfall as a cloudburst, and they say, generally, **that it rained harder than it was ever known before.** J. R. Anderson, superintendent of the Blue Ridge Railway, was at Anderson, and says it began to rain hard about 7 o'clock p. m., August 24th, and continued in a perfect downpour until about noon of the following day, the 25th, and that the rain was the hardest he had ever seen for such a period of time. (Tr., pp. 36, 38, 39, 41, 42, 45, 46.)

FIFTH. The Weather Bureau report issued at Augusta shows the following facts: On August 24th the

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river gauge at Augusta registered a height of 11 feet and 10 inches. On the morning of August 25th, it had risen to 22 feet 3 inches, and reports indicated the following heavy rainfalls for the preceding twenty-four hours: Anderson, 5.50 inches; Calhoun Falls, 3.65 inches; Washington, Ga., 1.28 inches; Greenwood, 1.94 inches. A flood warning was issued on the morning of August 25th, forecasting a stage of **thirty-three feet at Augusta in the next twenty-four hours or the morning of August 26th,** and this warning was disseminated widely among the farmers in the lowlands below the City of Augusta. At 10:30, on the morning of August 26th, the gauge registered 34.4 feet at Augusta, and the river was rising at the rate of seven-tenths of a foot per hour. A supplemental warning was then issued, placing the stage at thirty-eight feet by midnight, and the warning stated the entire City of Augusta would probably be submerged. By noon, August 26th, the water was rushing through the streets of Augusta like a millrace. The water continued to rise until about 2 a. m. of the 27th, when the gauge registered 38.8 feet, one inch higher than the flood of 1888. It remained stationary about three hours and then began to recede slowly, registering a height of 38 feet on the morning of August 28th. (Tr., p. 33.)

SIXTH. The yardmaster in Hamburg was notified by the superintendent on the afternoon of August 25th that there would be a rise in the river. (Tr., p. 16.)

SEVENTH. About 8 or 8:30 a. m., August 26th, the yard crew undertook to move these cars from the old Hamburg yard, but failed as the trestles gave way and water came in the ashpan of the engine. (Tr., pp. 16, 24, 28, 29.)

EIGHTH. They did move that morning all the cars they could reach **on to higher ground** before the water became too high (Tr., p. 16.)

NINTH. The records of the Commissioner of Public Works at Augusta, Ga., show the previous high waters at Augusta, as follows (Tr., p. 34):

Year.	Date.	Height.
1888.	September 11th	38.1½*
1891.	March 9th	35.5½
1892.	January 15th	29.5
1894.	October 11th	27.9
1895.	January 11th	30.6
1896.	July 10th	30.3
1897.	April 6th	29.4
1898.	September 3rd	28.5
1892.	February 8th	31.0
1900.	February 14th	32.8
1901.	April 4th	21.3
1902.	March 1st	34.7

*Note that the Weather Bureau report gives this flood as 38 feet 8½ inches.

Under these facts the Supreme Court of Louisiana found that the railroad companies were negligent in the following particulars:

(*a*) In sending the two cars of rice across the Savannah River into the old Hamburg Yard, on the South Carolina side of the river, at 1 o'clock a. m. on August 26, 1908.

(*b*) In placing, under the prevailing conditions, two cars of rice in a train in the low Old Hamburg Yard with a car of unslaked lime.

(*c*) In making no timely effort to remove the two cars of rice from the Hamburg Yard.

(*d*) In making no effort to keep the debris from piling up against the trestle leading from the main line to the Old Hamburg Yard and weakening it.

(*e*) In making no timely effort to put out the fire that destroyed the two cars of rice.

Mr. Chief Justice Breaux, as organ of the Court (Tr., p. 88), said:

> "It also appears that the cars containing plaintiff's rice were taken to the Hamburg yards about 1 o'clock on the morning of the 26th of August, 1908.
>
> "The question arises—Why was it that they put the cars in the low Old Hamburg Yard after they had received warning of the coming flood?"

And again (Tr., p. 90):

> "A close reading of the evidence compels the conclusion that there was not sufficient forethought on the part of the officers in charge of the railroad yards. We have seen that the river was rising rapidly on the morning of the 26th of August. Some of the witnesses testified that by 7 o'clock it had covered the switch tracks, and yet nothing was done to protect property. Leisurely enough, the employees went about their business and gave very little concern to the rising waters. Those who did attempt to save property [if what they did can be considered in that light] displayed very little activity; beginning at 8 o'clock, taking out a few cars and leaving others in the Old Hamburg Yard, that is all they did. These yards were submerged by water to a height above the floors of the cars. The question arises—was it possible before the waters reached their greatest height to move the cars to a safer place than where they were hauled to on

the morning of the 26th of August; that is, to the Old Hamburg Yards? We have noted, before 8 o'clock or 8:30 o'clock a. m., not the least attempt was made to move the cars out of the yard where they had been placed. Mr. Benson, inspector of the Southern Railway Company, testified that on the morning of the 26th of August, he reported at the Hamburg Yard at 7 o'clock to go to work, and at that time the water had just reached the rail in front of the block office. There were a crew and an engine in the yard. Why were they not put at work at the time to save the freight?

"Another witness, the night operator, renders it still more evident that it was possible to move the train in the morning, for he says that when he went to work the yard was entirely free from water on the 26th of August in the morning. An attempt was made to rescue the cars between eight and half-past eight o'clock a. m.; it failed. They went too late to rescue these cars. There had been ample time to save them.

"The oral testimony leads to the inference [as well as the blue print in evidence] that the Old Hamburg Yard is lower than the new yard. According to the blueprint in evidence, the water was quite above the rail of the track, and rose into the cars, while at the yard and telegraph office it was five inches over the rails. This was one of the reasons why they should have been careful not to run the cars into the old yard [the lowest place], after having received notice of the rise of the waters."

Again (Tr., p. 91):

"The rise of the waters in the Savannah River over its banks was not entirely unprecedented, although the rise of thirty-eight feet and eight inches was. Had preparations been made to meet the usual rise, the result would have been different. * * *

"These floods were frequent, and yet defendant remained indifferent, and even sent its cars to the

lowest places on the yard, where they were permitted to remain without making a serious and timely attempt to take them away.

"From all this evidence we are led to the inference, which we think is positive, that there was negligence. A little timely activity would have brought about a different result, and would have saved plaintiff's property, or would have placed defendant in a position to successfully defend themselves.

"Unquestionably, the river was rising rapidly on the morning of the 26th, at 7 o'clock; in thirty-five minutes it covered the switch tracks. It does not seem that anything was done to prevent the destruction of the cars. Leisurely enough, the employees went about their respective occupations, and now, when they give an account of themselves, it does seem as if they wish to lay all the trouble on the rising waters, although they remained indifferent when they should have exerted themselves."

And again (Tr., p. 93):

"On the rehearing only, the contention is that the suit is to be governed by the Carmack Amendment to the Interstate Commerce Act, interpreted in the *Croninger case*, 226 U. S. 148. But if it is to be governed by that decision, defendant would not be in much better position.

* * * * * * * * *

"Admitting, for a moment, all that is claimed under the Carmack amendment, under any of the laws of this country, indifferent railroad people, who receive freight to be transported some distance, and who, just before the waters of a storm have flowed down, stop the cars on the way, and run them to the lowest part of their yards, and place them next to cars loaded with quicklime, easily ignited by water, and leave them at that place, while other cars are taken out, and who make no attempt to haul them

> out, although the waters are rising slowly enough for such work, after warning given, are not protected from the charge of negligence under the law."

This shows that the Supreme Court of Louisiana based its judgment against the plaintiff in error entirely and exclusively on the fact that the destruction of the rice was due to the negligence of the Southern Railway Company.

The finding of the State Court upon the facts is conclusive upon this Court.

> See *Minn. & St. L. R. Co. vs. Minnesota,* 193 U. S. 53; *Waters-Pierce Oil Co. vs. Texas,* 212 U. S. 86; *Chrisman vs. Miller,* 197 U. S. 313; *Chapman, etc., Land Co. vs. Bigelow,* 206 U. S. 41 (51 L. Ed. 953); *Hedrick vs. Atchison, etc., R. Co.,* 167 U. S. 673; *Dower vs. Richards,* 151 U. S. 658; *Egan vs Hart,* 165 U. S. 188; *Thayer vs. Spratt,* 189 U. S. 346.

Under the Carmack act, under the decisions of this and other Federal Courts, and all the State Courts, except possibly Massachusetts and Pennsylvania, it is well settled that, where destruction of merchandise being transported by a common carrier is due to an act of God and the negligence of the carrier, the carrier is liable.

In *The Majestic,* 166 U. S. 375, passengers' baggage in the hold of *The Majestic* was injured by water coming through the porthole. Defendants pleaded act of God—namely, that the porthole had been broken in by a piece of wreckage striking against it in a high sea. The Court said, through Chief Justice Fuller (p. 386):

> "The question still remains, on the doctrine of implied exceptions, whether the injury here was by

the act of God, for which the company was not liable. The burden in this respect is on the carrier. (*Clark vs. Barnwell*, 12 How. 272; *Transportation Company vs. Downer*, 11 Wall. 129; *The Edwin I. Morrison*, 153 U. S. 199; *The Caledonia*, 157 U. S. 124.)

"The act of God, said Chancellor Kent (Vol. 2, p. 597), means 'inevitable accident, without the intervention of man and public enemies'; and again (Vol. 3, p. 216) that 'perils of the sea denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human prudence. A *casus fortuitus* was defined in the civil law to be, *Quod damno fatali contingit, cuivis diligentissimo possit contingere.* It is a loss happening in spite of all human effort and sagacity.' The words 'perils of the sea' may, indeed, have grown to have a broader signification than 'the act of God'; but that is unimportant here.

"Judge Shipman, in the Court of Appeals, quotes from 1 Parsons on Shipping, 255, the definition there given of the 'act of God,' and the reason for it, as follows: 'The "act of God" is limited, as we conceive, to causes in which no man has any agency whatever; because it was intended never to raise, in the case of the common carrier, the dangerous and difficult question whether he actually had any agency in causing the loss; for, if this were possible, he should be held.'

"We think it quite clear that the damage complained of cannot be held to have been the result of such inevitable accident. The evidence was wholly unsatisfactory as to any inspection of the porthole before the vessel left Liverpool. What the chief officer says in that regard, in answer to leading questions, is manifestly not of his own personal knowledge, but on the assumption that such inspection had taken place, because it should have, which could have been established, yet was not, by calling

the person whose duty it was to make it. Whether the ports were properly closed when the vessel sailed was not made out, nor was any such inspection of the compartment, after she sailed, proved, as, if the ports were not properly closed, would have detected the fact. The two or three feet of water in the mail room, Orlop No. 3, was perhaps not more than might have been taken in during the first four or five days of the voyage if the ports were not securely fastened and partially open. As remarked by the District Judge, whether the covers to all of the ports in the mail room, where this baggage was placed, were screwed down tight, or whether some of them were left open for light or any other purpose, was not affirmatively shown. The theory of the defense was that the breaking of the port was caused by floating wreckage, and, while that might possibly have been so, there was no evidence directly tending to establish it as a fact. **If it had shown** that when the vessel sailed the ports were in proper condition, and properly closed, and that this was their condition on the day before the accident was discovered, that would have presented a different question. The captain testified that the iron dummy was turned back in a way which could not have been done by the sea, but he admitted that his memory was treacherous after the lapse of time; and the log stated that the port was broken 'either by the sea or by wreckage,' while the chief officer, who was on the bridge, as the captain was not, said that between six and eight that morning he saw only one large piece of wreckage, which was 'a good-sized piece of timber, on the port side, away from the ship.'

"And, as Judge Brown held, if the wreckage referred to was of a kind adequate to force open an iron cover properly constructed and firmly screwed down over the port, **then it devolved upon the com-**

> **pany to show why the ship** did not steer away from the wreckage or slacken speed while passing through it; and this was not attempted. **In our opinion, the company failed to show that the accident was one which could have been prevented by human effort, sagacity and care; and we perceive no reasonable ground for disagreeing with the judgment of the District Court upon the facts."** (Black-letter ours.)

See, also, 24 Howard 121, *The Union S. S. Co. vs. Virginia S. S. Co.*, where this Court said:

> "Plainly, therefore, it is only when disaster happens from natural causes, and without negligence or fault on either side, that the defense set up in this case can be admitted."

See, also, 12 Wallace 254, *Holiday vs. Kennard*, where this Court said:

> "If carrier's negligence contributed to loss by public enemy, it is liable."

See 21 Wallace 230, *The Mohler*, where this Court said:

> "It is insisted that the loss occurred through a peril of navigation, which was one of the exceptions contained in the bill of lading, and that, therefore, the carrier was excused from a delivery of the wheat. The burden of proof lies on the carrier, and nothing short of clear proof, leaving no reasonable doubt for controversy, should be permitted to discharge him from duties which the law has annexed to his employment."

See, also, 125 Fed. 860, *Harrison vs. Hughes*, paragraph three of the syllabus reading as follows:

> "The extinguishment of the stake light by the wind, due to its improper adjustment, cannot be at-

tributed to the act of God or *vis major*, so as to relieve the contractors from liability, being something which might reasonably have been anticipated, and could have been guarded against in the exercise of reasonable vigilance."

See, also, *Wald vs. Pittsburg, C. C. & St. L. R. Co.*, 162 Ill. 545 (35 L R. A. 356.) Paragraph two of the syllabus reads as follows:

"A common carrier is not exempt from liability for a loss which takes place because of an act of God if the carrier has been guilty of any previous negligence or misconduct which brings the property in contact with the destructive force of the *actus Dei*, or unnecessarily exposes it thereto." And also

Mississippi Logging Co. vs. Robson, 69 Fed. 773 (16 C. A. 400, 32 U. S. 520); *McGraw vs. Baltimore, etc., R. Co.*, 18 W. Va. 365 (41 Am. Rep. 696); see, also, *Engster vs. West*, 35 La. An. 119 (48 Am. Rep. 232); *O'Connor vs. Forster*, 10 Watts (Pa.), 418; *Lehman, Stern & Co. vs. M. L. and T. R. R. Co.*, 125 La. 1.

HUMAN AGENCY EXCLUDED. The expression, "act of God," held to exclude all idea of human agency.

Demeule vs. Quebec, etc., Electric Co., 32 Quebec Super. Ct. 318, quoting this proposition from 1 Am. & Eng. Enc. of Law (2nd Ed.), 587; *Ohlen vs. Atlanta, etc., R. Co.*, 2 Ga. App. 323 (58 S. E. 511); *Kirby vs. Wylie* (Md.), 70 Atl. 213, quoting this proposition from 1 Am. & Eng. Enc. of Law (2nd Ed.), 584, 585; *Dibble vs. Morgan*, 1 Woods,

406 (7 Fed. Cas. Bo. 3881); *Chicago, etc., R. Co. vs. Sawyer,* 69 Ill. 285 (18 Am. Rep. 626); *Merchants' Dispatch Co. vs. Smith,* 76 Ill. 542; *Indiana, etc., R. Co. vs. Hawkins,* 81 Ill. App. 570; *McClary vs. Sioux City, etc., R. Co.,* 3 Neb. 44 (19 Am. Rep. 631); *Parsons vs. Monteath,* 13 Barb. (N. Y.) 353; *Smith vs. North American Transp., etc., Co.,* 20 Wash. 580 (56 Pac. 372).

"When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the operation of the rules applicable to acts of God."

Polack vs. Pioche, 35 Cal. 416 (96 Am. Dec. 115); *Norris vs. Savannah, etc., R. Co.,* 23 Fla. 182 (1 So. 475, 11 Am. St. Rep. 355); *Central Line of Boats vs. Lowe,* 50 Ga. 509; *Louisville, etc., R. Co. vs. Hedger,* 9 Bush (Ky.), 645; *Kiff vs. Old Colony, etc., R. Co.,* 117 Mass. (19 Mass. Rep. 429); *Michaels vs. New York Central R. Co.,* 30 N. Y. 564 (86 Am. Dec. 415); *Read vs. Spraulding,* 30 N. Y. 630 (86 Am. Dec. 426); *Friend vs. Woods,* 6 Gratt. (Va.) 189 (52 Am. Dec. 119); *Klauber vs. American Express Co.,* 21 Wis. 21 (91 Am. Dec. 452).

In 2 Parsons on Contracts (7th Ed.), 159, it is said:

"We take the true definition of the 'act of God' to be a cause which operates without the aid or in-

terference from man. For, if the cause of loss was wholly human, or became destructive by human agency and co-operation, then the loss is to be ascribed to man, and not to God, and to the carrier's negligence, because it would be dangerous to the community to permit him to make a defense which might so frequently be false and fraudulent."

HEAVY RAINS NOT ACT OF GOD.—In *Cannon vs. Hunt*, 113 Ga. 501 (38 S. E. 983), it was said:

> "Constant, unusual or heavy rains cannot of themselves be classed as a providential hindrance."

See, also, *Greeson vs. Virginia Midland R. Co.*, 140 U. S. 435 (11 S. Ct. 859, 35 U. S. [L. Ed.] 458); *Sawyer vs. Ives*, 4 Quebec Q. B. 389.

On page 1111 of Volume 1 of the New American and English Encyclopedia of Law and Practice, the rule is as follows:

> "*b*) NEGLIGENCE OF CARRIER AS CO-OPERATIVE CAUSE.—CARRIERS NOT EXEMPTED. **Where the negligence of the carrier concurs with an act of God in producing a loss, the carrier is not exempted from liability by showing that the immediate cause of the damage was the act of God.** (*Siegel vs. Eisen*, 41 Cal. 109; *Williams vs. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Converse vs. Brainerd*, 27 Conn. 627, and many others.) Or, as it has been expressed: 'Where the loss is caused by the act of God, if the negligence of the carrier mingles with it as an active and co-operative cause, he is still responsible.' (*Steele vs. McTye*, 31 Ala. 667, 70 Am. Dec. 516; *Peck vs. Weeks*, 34 Conn. 145, and many others.)

Thus, an act of God, such as a flood, is no excuse to the carrier if he could have foreseen the happening of the event, and, by the exercise of due diligence, protected the goods against loss and injury. (*Smith vs. Western R. Co.*, 91 Ala. 455, 8 So. 754, 11 L. R. A. 619, 24 Am. St. Rep. 929); *Savannah, etc., R. Co. vs. Commercial Guano Co.*, 103 Ga. 590, 30 S. E. 555; *Clark vs Pacific R. Co.*, 39 Mo. 184, 90 Am. Dec. 458; *Pinkerton vs. Missouri Pac. R. Co.*, 93 S. W. 8491; *Moffat Commission Co. vs. Union Pacific R. R. Co.*, 113 Mo. App. 544, 88 S. W. 117, and many others.)"

Page 1113 (*b*):

"It is not sufficient to relieve a carrier of liability for injury to goods that the damage should have resulted from unusual and unforeseen action of nature. The carrier must show, further, that the injury could not have been prevented by any foresight, pains or care reasonably to be expected. (*Harzburg vs. Southern R. Co.*, 65 S. C. 539, 543, 545.)"

Ga. & S. F. R. Co. vs. Barfield, 58 S. E. 236:

"An injury cannot be said to be the act of God which, under any fair view, can be attributed to the negligence of man."

So. Ry. Co. in Kentucky vs. Smith, 102 S. W. 232 (31 Ky. Law. Rep. 243):

"To exempt a carrier from liability for loss of goods by reason of act of God, it must be free from negligence."

Fentiman vs. A. T. & S. F. Ry. Co., 98 S. W. 939 (Tex.); see, also, *Davis vs. Wabash, St. L. & P. Ry. Co.*, 13 Mo. App. 449.

Elliott on Railroads, Vol. 4, par. 1457, says:

> "But it is clear that where the negligence of the carrier mingles as a proximate cause with the act of God, and the resulting loss is a probable consequence of such negligence, as where the carrier was aware of an extraordinary flood or the like in time to have saved the goods by the exercise of ordinary care and diligence, the carrier is liable for the resulting loss."

The law is well put in the case of *Grier vs. Railroad*, 108 Mo. App. Reps. 580, where the Court said:

> "If the negligence on the part of the appellant co-operated with the violence of nature in bringing about the loss of respondent's property, the appellant must answer in damages. (*Haney vs. Kansas City*, 94 Mo. 334, 7 S. W. 417; *Brash vs. St. Louis*, 161 Mo. 433, 61 S. W. 808.) It is only when an act of God, unmixed with proximate negligence on the part of the carrier, injures and destroys in the latter's custody, that it is excused from answering to the owner. The cases cited and relied on by the appellant dealt with a state of facts in which, though the carrier was negligent in handling the property consigned to it, its negligence, which consisted in unreasonable delay in transporting the property to destination, did not enter as a proximate cause into the loss of the property, which loss was due, legally speaking, solely to the act of God. (*Denny vs. Railroad*, 13 Gray, 48; *Headley vs. Transportation Co.*, 113 Mass. 304; *Morrison vs. Davis*, 20 Penn. St. 171; *Long vs. Railroad*, 147 Penn. St. 343; *Henning vs. Railroad*, 32 Am. & Eng. Railroad Cases (Va.), 262; *Slater vs. Railroad*, 29 Ga. 96; *Northwest Trans. Co. vs. Ins. Co.*, 41 Fed. 793; *Railway vs. Reeves*, 10 Wall. (U. S.) 176; *St. Louis, etc., Co. vs. Ins. Co.*, 139 U. S. 223.) In all those decisions it appeared

the carrier had been guilty of some delay in moving the property, but for which it would not have been where the catastrophe occurred, and, therefore, would have escaped injury. But, **as the catastrophe happened unexpectedly,** and was not **within the range of reasonable foresight, the negligent delay was not indulged** while the carrier realized there was peril to the property, and, therefore, did not participate, as a concurrent cause, in bringing about the loss. The doctrine of the cases cited on this point by the appellant is one that pervades the law of negligence, and by virtue of it a common carrier's neglect, like any other party's, must enter as a proximate cause into the happening of an injurious accident to entail liability. But it **need not be** the sole cause. **If it is a contributive one, liability attaches to the carrier."**

Both the original and final opinions of the Louisiana Supreme Court quote from the opinion of Justice Hydrick, of the Supreme Court of South Carolina, in the case of *Ferguson vs. Southern Railway Company,* 91 S. C. 61 (74 S. E. Rep. 129, as containing a clear and accurate expression of the principles which should govern. This was a suit against the same railroad company for damages to freight caused by the flood in the Wateree River, in South Carolina, August 26, 1908, and in many facts and attendant circumstances is very similar to the present case, though not so strong, as the car in that case was not placed in a train with unslaked lime, and that flood was three and a half feet higher than all former floods, while in this case it was only one inch higher. The decision, handed down in April, 1911, in which the carrier was held liable, reads in part as follows:

"The rule upon which this case must be decided was stated thus in *Slater vs. Railway:* 'Where an act

of God causes injury to property in the hands of a common carrier, and such act is the sole cause of such injury, then the proof of this fact is a perfect shield. But if there be any negligence on the part of the carrier which, if it had not been present, the injury would not have happened, notwithstanding the act of God, the carrier cannot escape responsibility. And the onus is upon the carrier to show not only that the act of God was the cause, but that it was the entire cause; because it is only when the act of God is the **entire** cause that the carrier can be shielded.'

"Before proceeding to a consideration of the testimony, we state some of the principles which should guide the Court in deciding whether there is any evidence of negligence on the part of a defendant in a case like this, and which should likewise guide the jury in passing upon its sufficiency, and in determining whether it preponderates.

"In 1 Thomp. on Neg., Sec. 28, the author says: 'In determining whether the due degree of care has been exercised in any situation, reference must be made to the facts and surroundings of that situation, and the question cannot be determined by abstract theorizing or idealizing. The question must be looked at as the defendant might have looked at it, situated as he was, and surrounded as he was. The jury ought to determine it by their foresight, and not by their hindsight. Speaking with reference to this question, it has been quaintly reasoned that the fact that, after an injury occurs by accident, some man of genius discovers a superior method of preventing such accidents, does not show negligence in failing to use such method of prevention. Accordingly, that which never happened before, and which in its character is such that it would not naturally occur to prudent men to guard against its happening, cannot, when, in the course of years, it does

happen, furnish good grounds for a charge of negligence in not foreseeing its possible happening, and guarding against that remote contingency.' In *Cornmann vs. Eastern Counties R. Co.*, 4 H. & N. 786, Bramwell, B., said: 'In such a case, it is always a question whether the mischief could have been reasonably foreseen. Nothing is so easy as to be wise after the event.' In 21 A. & E. Enc. of Law (2nd Ed.) it is said: 'The mere fact that an injury might have been avoided by the adoption of certain precautions does not prove that there was fault in failing to anticipate and provide against it. Nor is the fact that after the occurrence of an accident it is seen that such accident might have been easily guarded against conclusive of negligence. Thus, where the possibility of a particular occurrence is demonstrated only by its happening, there is no liability in negligence. But the fact that no such accident as the one complained of had ever happened before is not, of course, conclusive of the fact that there was no negligence.'

"In Volume 13 of the same work, page 721, it is said: 'An extraordinary flood is to be classed among the acts of God which no human power can prevent or avert. Whether it will relieve the carrier from liability depends upon whether its results or natural consequences could, by the exercise of reasonable foresight and prudence, have been foreseen and guarded against. If the emergency was one that no human sagacity, guided by any of the known principles of human reasoning, could have anticipated, the carrier will be relieved. **If, on the other hand, its effects might have been foreseen by the exercise of reasonable diligence and prudence, a failure to do so would be negligence and subject the carrier to damages, although the original cause was the act of God.**' And, on page 722 of the same volume, this rule is stated: 'If a carrier discovers that goods in-

trusted to his care are in peril of injury or destruction by a flood, then it becomes his duty to use actively and energetically all the means at his command, or which it might be reasonably expected that one engaged in such business would possess, to meet the emergency, and save the property from injury, and any neglect to use the means stated above, which prudent, skillful men in that business might ordinarily be expected to use in such an emergency will subject the carrier to liability.'

"It requires no citation of authority to sustain the proposition that, after a carrier has discovered, or, by the exercise of reasonable prudence and diligence should have discovered, that goods in his possession are subject to the peril sof an unprecedented flood, or other *vis major*, it is his duty to exercise reasonable care and diligence to save them from damage or loss." (Black-letter ours.)

Should Your Honors conclude to review the evidence in the record with a view of determining, independently of the opinion of the Supreme Court of Louisiana, whether or not the defendants were negligent, we believe that the undisputed facts clearly show that the railroad companies were negligent.

The opinion of the Supreme Court of Louisiana on rehearing discusses the evidence on the questions of negligence so fully, and the conclusion reached by it, that the railroad companies were negligent, is so logical and so strongly fortified by quotations from the evidence, that we shall make but few additional comments.

The railroad companies had knowledge that the Savannah River was rising rapidly and would at least go to 33 feet by the morning of August 26th, and higher if the rain continued above. Notwithstanding this, it deliberately at

1 o'clock on the morning of the 26th, sent the two cars of rice across 1,600 feet of track and three trestles into the old Hamburg yard, and there placed them in a train with lime that is easily ignited by coming in contact with water.

Admitting that an unsuccessful effort was made to get the two cars of rice out of the Hamburg yards on the morning of August 26th, about 8 o'clock, the question presents itself why were the two cars sent into the Hamburg yard at 1 o'clock on that morning if it was necessary to remove them at 8 a. m. Surely the railroad companies did not know anything more at 8 o'clock than they did at 1 o'clock, when they sent the cars across the Savannah River into the old yard. The knowledge that prompted the railroad companies to endeavor to remove the cars at 8 a. m., August 26th, was present, and should have warned them not to send the two cars of rice into the Hamburg yard at 1 o'clock, August 26th. The river was no higher at 8 a. m. on August 26th than the bureau had predicted it would be twenty-four hours earlier. If the height of the river at 8 a. m. on the morning of August 26th was sufficient to require the carrier to attempt to remove the cars from the old Hamburg yard, then the warning of the weather bureau on the morning of August 25th, that the river would be at the height that it really was on the morning of August 26th, should have prevented the carrier from sending the cars into the old Hamburg yard at 1 o'clock on the morning of the 26th, and there placing them in a train with a carload of unslaked lime.

At 10:30 a. m., August 26th, the gauge showed 34.4 feet of water, and the river was then rising at the rate of 7/10 of a foot per hour; therefore, at 8 o'clock a. m., August 26th, the water had not reached the gauge predicted for that hour. If due care suggested at 8 a. m. the attempt to

remove, should not the same due care have suggested placing them on higher ground at 1 a. m.?

In *Memphis R. Co. vs. Reeves*, 10 Wall. 176, the case so often quoted and so strongly relied on by plaintiff in error, the statement of facts reads in part as follows:

> "Freshets of the years 1826 and 1847, the highest ever remembered previous to one now to be spoken of, or of which there was any tradition, had not risen by **within three feet as high as the level of the railroad track** in the station where the cars containing the tobacco were placed, on their coming back to Chattanooga, after their unsuccessful attempt to go forward. * * *
>
> "The rise was at first gradual, and from the direction of Lookout Mountain, by backing; but afterwards it came **suddenly from the direction of the Western and Atlantic road, opposite to its former direction, and then rose very rapidly.**"

Justice Miller, the writer of the opinion of the *Reeves case*, quotes approvingly from the decision in the case of *Morrison vs. Davis & Co.*, 20 Pa. State 171, as follows:

> "The Court further held that when carriers discover themselves in peril of inevitable accident, the law requires of them ordinary skill care and foresight, which it defines to be the common prudence which men of business and heads of families usually exhibit in matters that are interesting to them."

In the present case the heavy downpour of rain fell from 75 to 100 miles above Augusta and Anderson, S. C., on the night of August 24th and the morning of August 25th, but these cars were not destroyed until the afternoon of August 26th. Notwithstanding plaintiff in error had

knowledge of the downpour of rain, which was harder than ever known before, and that there was going to be an overflow of the Savannah River at Augusta, it deliberately run the cars of rice into Augusta, and at 1 a. m. on the 26th of August sent them to the low old Hamburg yard, and there placed them in a train with quicklime.

In all the Federal cases, as in the *Reeves case* quoted by plaintiff in error, the catastrophe happened suddenly, and this suddenness was an essential element of the successful defense. The weather bureau report of August 25th, when the gauge showed 22.3 feet, indicated a rainfall of 5½ inches at Anderson, and 3.65 inches at Calhoun Falls (see Tr., p. 33), for the preceding 24 hours. These points are from 75 to 100 miles above Augusta, on the Savannah River, and the water was obliged to find an outlet through that river, and common sense and common prudence should have made this carrier know that the predicted 33 feet would not be the maximum.

The fact that these rains happened 100 miles above Augusta, while the rains causing the flood of 1888, which was only one inch lower, fell right there, weakens rather than strengthens defendant's argument, for railroads, like ordinary men, are supposed to know that water will seek the sea level.

We beg to call the Court's attention to the fact that the immediate cause of the loss was fire; the fire was the result of the combination of two concomitant factors—namely, water and lime. Had there been no fire, the rice would have suffered but little damage. Why should the water be considered the "*causa causans*" any more than the placing of the cars in a train with a car of lime? They were placed there on the morning of August 26th at 1 o'clock,

notwithstanding the certainty of a flood and the fact that, on August 26th, the old Hamburg yard would most probably be submerged to a greater depth than ever before, as the rainfall just above had been unprecedently heavy on August 25th. On this point see 166 U. S. 52, *Washington & Georgetown R. Co. vs. Hickey.* Here the gateman of a steam railroad raised the gates and the driver of a street car drove upon the track in front of a moving train. The gates were then lowered, and one of the street car passengers was injured in the commotion. This Court held that both the street car company and the steam railroad were liable, using the following language on page 527:

> "The negligent act of the horse car driver joined with and became a part of the other act in wrongfully lowering the gates, as described, and both acts constituted but one cause for the commotion which naturally resulted therefrom, and on account of both of these acts, as parts of a whole transaction, the injury occurred."

We respectfully ask that the writ of error be dismissed, and, in the alternative, that the judgment of the lower Court be affirmed.

Respectfully submitted,

GUSTAVE LEMLE,
W. CATESBY JONES,
ARTHUR A. MORENO.

APPENDIX

We have just received the brief of plaintiff in error, and quote therefrom the following paragraph, which is found in his discussion of the limitation of the bill of lading—viz.:

> "Notwithstanding all this, the Supreme Court of the State of Louisiana has ridden roughshod over the contract between the parties, and, without any prayer to that effect by the original plaintiff, defendant in error, has wiped out the stipulations of that contract, and has held that the burden of proof was and is upon the carriers. This holding is in the teeth of the Federal jurisprudence upon the subject."

We challenge this statement sharply and beg to call the attention of this Honorable Court again to the quotations cited above from the opinion of the Louisiana Supreme Court which show conclusively that this Court found that the carriers were negligent and were liable under any system of law, whether State or Federal. Plaintiffs in error contend that we have failed to sustain burden of proof, because we did not put any witnesses on the stand to testify with regard to negligence of carrier. As we understand the law, it is not necessary in order to sustain burden of proof to introduce witnesses. Here the admissions of defendants' witnesses, both on direct and cross-examination, show conclusively that the defendant has been negligent. This is all that is required. The burden of proof has been sustained.

In conclusion, we beg to call this Honorable Court's attention to the case of *United States vs. King*, 7 How. 865, where Mr. Justice Wayne, on rehearing, held that the facts

found by the Louisiana Supreme Court were final in the following language:

> "No point has been more repeatedly and authoritatively settled than that this Court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the Court below, and as they are exhibited by the record."

NEW ORLEANS & NORTHEASTERN RAILROAD CO. *v.* NATIONAL RICE MILLING CO.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 615. Argued February 27, 1914.—Decided May 25, 1914.

Where the judgment of a state court rests upon an independent ground not only adequate to sustain it but in entire harmony with an asserted Federal right, there is no denial of that right in the sense contemplated by § 237 of the Judicial Code, and the writ of error will be dismissed.

Where the initial carrier sets up the Carmack Amendment and also denies negligence, but the state court finds from conflicting evidence that the loss was occasioned by the negligence of the connecting carrier, the judgment rests on that finding as an independent ground, and this court has not jurisdiction.

A party is entitled to the benefit of all the testimony in the case from whatever source it comes; and, although having the burden of proof, need not prove any fact otherwise established.

Writ of error to review 132 Louisiana, 615, dismissed.

THE facts, which involve the jurisdiction of this court to review the judgment of a state court within § 237, Judicial Code, are stated in the opinion.

Mr. J. Blanc Monroe, with whom *Mr. John K. Graves* and *Mr. Monte M. Lemann* were on the brief, for plaintiff in error:

The sole issue in the case is not merely an issue of fact; nor is the Federal question frivolous.

The judgment of the lower court does not rest upon a question of general law, broad enough to sustain it, so that the decision of the Federal question is unnecessary.

In support of these contentions, see *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300; *Adams Exp. Co.* v. *Croninger*, 226 U. S. 491; *Bachtel* v. *Wilson*, 204 U. S. 36; *Baltimore & Ohio R. Co.* v. *Maryland*, 20 Wall. 643; *Creswill* v. *Grand Lodge*, 225 U. S. 246; *Dower* v. *Richards*, 151 U. S. 658; *Elam* v. *St. Louis &c. R. R. Co.*, 93 S. W. Rep. 851; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592; *International R. R. Co.* v. *Gergman*, 64 S. W. Rep. 999; *Kansas City So. Ry. Co.* v. *Albers Com. Co.*, 223 U. S. 573; *Kaukauna Water Power Co.* v. *Green Bay Canal Co.*, 142 U. S. 254; *Leigh* v. *Green*, 193 U. S. 79; *Mackay* v. *Dillon*, 4 How. 421; *Mallett* v. *North Carolina*, 181 U. S. 589; *Memphis R. R. Co.* v. *Reeves*, 10 Wall. 176; *Penna. R. R. Co.* v. *Hughes*, 191 U. S. 477; *Schlemmer* v. *Buffalo &c. Ry. Co.*, 205 U. S. 1; *Stanley* v. *Schwalby*, 162 U. S. 255; *Terre Haute* v. *Indianapolis &c. Ry. Co.*, 194 U. S. 579.

Mr. W. Catesby Jones, with whom *Mr. Gustave Lemle* and *Mr. Arthur A. Moreno* were on the brief, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action to recover the value of two cars of rice destroyed by fire in August, 1908, while being transported over connecting railroads from New Orleans, Louisiana, to Charleston, South Carolina. The rice was shipped upon through bills of lading issued by the initial carrier and was destroyed while in the second carrier's custody at Old Hamburg, South Carolina. The two cars, with others

containing quicklime, were side-tracked in the yard at that place awaiting further movement towards their destination. The yard adjoined the Savannah River, which was then almost out of its banks and steadily rising as a result of extraordinary rains and cloudbursts extending up the river and its tributaries one hundred miles. The waters continued to rise, spread over the yard to a considerable depth, and ultimately reached the quicklime, thereby causing the cars to burn and destroying the rice. The cars had been in the yard about sixteen hours when the fire started. The action was against both carriers, and it was alleged in the petition, which based the right of recovery upon the Carmack Amendment to the Interstate Commerce Act (June 29, 1906, 34 Stat. 584, 595, c. 3591, § 7), that the loss of the rice was caused by the negligence of the second carrier, and that the two carriers were jointly liable. Issue was joined, and, after a trial, the district court of the parish rendered a judgment against the carriers jointly and *in solido*, which the Supreme Court of the State at first reversed and then, after a rehearing, affirmed. 132 Louisiana, 615; 61 So. Rep. 708. The carriers sued out this writ of error, basing their right so to do upon a claim that by the judgment of affirmance they were denied a right or immunity asserted under a law of the United States.

A motion to dismiss was presented along with the merits, and we think it is well taken.

The bills of lading contained these stipulations:

"This company or other carriers over whose line the property may pass, shall not be held responsible for loss or damage [unless through proved carelessness or negligence of their employés] resulting . . . from heat, cold, fire, flood, storms, mobs or other causes not subject to the carrier's control.

"Neither this company nor any of its connecting carriers shall be liable for any damage to, or destruction of

said property by fire, unless such damage or destruction shall result directly and exclusively from their negligence or that of their employés, and unless such negligence shall be affirmatively established by the owner of said property."

In the Supreme Court of the State the carriers contended that, under the combined operation of the Carmack Amendment as interpreted in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, the stipulations in the bills of lading, and the common-law rule applied in *Railroad Co.* v. *Reeves*, 10 Wall. 176, and other cases,[1] they were entitled to exoneration upon showing that the rice was destroyed by the extraordinary flood, unless it also was shown that the second carrier contributed to the loss by negligently failing to take reasonable precautions to avoid it when the rising waters gave warning of the danger; and it was particularly urged as a part of this contention that the burden was upon the plaintiff to show such negligence, and not upon the carriers to show the absence of it. But the court, although disapproving the latter phase of the contention and thinking the carriers were charged by the law of Louisiana with the burden of showing that there was no negligence, did not rest its judgment upon that ground. On the contrary, it examined the evidence, which comprehensively covered the subject, to ascertain whether, upon the hypothesis that the contention of the carriers was sound, they were liable, and from that examination it found as matter of fact that the second carrier had negligently permitted the cars of rice to remain within the influence of the rising flood and in immediate proximity to the quicklime when ordinary prudence required that they be moved to a place of safety; and that this was

[1] *Clark* v. *Barnwell*, 12 How. 272, 280, 281, 283; *Transportation Co.* v. *Downer*, 11 Wall. 129, 133; *Cau* v. *Texas & Pacific Railway Co.*, 194 U. S. 427, 432.

made an independent ground of the judgment is shown by the court's extended discussion of the evidence and by the following excerpts from its opinion:

"A close reading of the evidence compels the conclusion that there was not sufficient forethought on the part of the officers in charge of the railroad yards. We have seen that the river was rising rapidly on the morning of the 26th of August. Some of the witnesses testified that by 7 o'clock it had covered the switch tracks, and yet nothing was done to protect property. Leisurely enough, the employés went about their business and gave very little concern to the rising waters. Those who did attempt to save property (if what they did can be considered in that light) displayed very little activity, beginning at 8 o'clock, taking out a few cars and leaving others in the Old Hamburg yards. That is all they did. These yards were submerged by water to a height above the floor of the cars. The question arises: Was it possible, before the waters reached their greatest height, to move the cars to a safer place than where they were hauled to on the morning of the 26th of August; that is, to the Old Hamburg yards? We have noted, before 8 o'clock or 8.30 o'clock a. m., not the least attempt was made to move the cars out of the yard where they had been placed. Mr. Benson, inspector of the Southern Railway Company, testified that on the morning of the 26th of August, he reported at the Hamburg yard at 7 o'clock to go to work, and at that time the water had just reached the rail in front of the block office. There were a crew and an engine in the yard. Why were they not put at work at that time to save the freight?

"Another witness, the night operator, renders it still more evident that it was possible to move the train in the morning, for he says that when he went to work the yard was entirely free from water on the 26th of August in the morning. An attempt was made to rescue the cars between 8 and half past 8 o'clock a. m. It failed. They

went too late to rescue these cars. There had been ample time to save them. (132 Louisiana, p. 643.)

* * * * * * * *

"These floods were frequent, and yet defendant remained indifferent, and even sent its cars to the lowest places on the yard, where they were permitted to remain without making a serious and timely attempt to take them away.

"From all this evidence we are led to the inference, which we think is positive, that there was negligence. A little timely activity would have brought about a different result, and would have saved plaintiff's property, or would have placed defendant in a position to successfully defend itself.

"Unquestionably the river was rising rapidly on the morning of the 26th at 7 o'clock; in 35 minutes it covered the switch tracks. It does not seem that anything was done to prevent the destruction of the cars. Leisurely enough, the employés went about their respective occupations, and now, when they give an account of themselves, it does seem as if they wish to lay all the trouble on the rising waters, although they remained indifferent when they should have exerted themselves (p. 645).

* * * * * * * *

"Admitting for a moment all that is claimed under the Carmack Amendment, under any of the laws of this country, indifferent railroad people, who receive freight to be transported some distance, and who, just before the waters of a storm have flowed down, stop the cars on the way, and run them to the lowest part of their yards, and place them next to cars loaded with quicklime, easily ignited by water, and leave them at that place while other cars are taken out, and who make no attempt to haul them out, although the waters are rising slowly enough for such work after warning given, are not protected from the charge of negligence under the law" (p. 649).

True, the testimony upon which the court rested its conclusion that negligence was proved did not come from the plaintiff's witnesses but from those for the carriers, and was largely elicited by cross-examination, but that is quite immaterial. The plaintiff was entitled to the benefit of all the testimony in the case, from whatever source it came, and was not required, even though having the burden of proof, to go through the ceremony of proving any fact otherwise established.

As it clearly appears that the judgment rested upon a ground which was not only adequate to sustain it but in entire harmony with the carrier's asserted Federal right, it cannot be said that there was a denial of that right in the sense contemplated by § 237 of the Judicial Code. Whether the right was well founded we therefore need not consider.

Writ of error dismissed.